

E. Hughes

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**Vol. I**  
**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1926**

**No. 249**

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**BEECH-NUT PACKING COMPANY, PETITIONER,**

**vs.**

**P. LOBILLARD COMPANY**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE THIRD CIRCUIT**

---

**PETITION FOR CERTIORARI FILED DECEMBER 3, 1926**

**CERTIORARI GRANTED JANUARY 11, 1926**

**(31,557)**

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IN THE UNITED STATES DISTRICT COURT, DISTRICT OF  
NEW JERSEY.

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IN EQUITY.

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TRADE-MARK.

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BEECH-NUT PACKING COMPANY

*v.*

P. LORILLARD COMPANY.

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DOCKET ENTRIES.

June	17,	1921.	Bill of Complaint filed.
"	"	"	Subpœna issued.
"	22,	"	Subpœna returned, served June 20 and filed.
July	6,	"	Stipulation extending time to Answer filed.
Aug.	13,	"	Answer filed.
Sept.	19,	"	Depositions on behalf of plaintiff filed.
"	24,	"	Depositions on behalf of plaintiff filed (4).
"	"	"	Certificate of Examiner filed.
"	28,	"	Stipulation extending time to reply filed.
Oct.	10,	"	Stipulation and Order allowing Pltff. to file Answer to Counterclaim filed.
"	"	"	Answer to Defendant's Counterclaim filed.
"	14,	"	Stipulation extending time to take testimony filed.
"	25,	"	Depositions on behalf of plaintiff filed.

*Docket Entries*

- Oct. 27, 1921. Depositions on behalf of plaintiff  
filed.
- Nov. 12, " Depositions on behalf of plaintiff  
filed.
- " 16, " Stipulation extending time for taking  
Depositions filed.
- " 26, " Depositions on behalf of plaintiff  
filed.
- Dec. 13, " Order apportioning times for taking  
Depositions, &c.
- Jan. 3, 1922. Depositions on behalf of plaintiff  
filed.
- " 5, " Depositions on behalf of plaintiff  
filed.
- " 9, " Depositions on behalf of plaintiff  
filed.
- " 17, " Cause placed on Calendar.
- Feb. 16, " Deposition of Frank M. Fairfield on  
behalf of plaintiff, filed.
- Mar. 30, " Depositions on behalf of plaintiff  
filed (2).
- " 31, " Deposition of Francis E. Barbour on  
behalf of plaintiff filed.
- Apr. 3, " Depositions on behalf of Plaintiff  
filed.
- " " " Depositions on behalf of Plaintiff  
filed.
- " 7, " Depositions on behalf of Plaintiff  
filed.
- " 3, " Continued for Jan. Term.
- " 24, " Stipulations as to Exhibits filed (4).
- June 15, " Stipulation and Depositions of Geo.  
B. Roach & Bryan O. Foster, filed.
- " " " Depositions on behalf of Plaintiff  
filed.
- Sept. 11, " Continued for April Term.

*Docket Entries*

iii

Nov.	8,	1922.	Depositions on behalf of defendant filed.
"	9,	"	Depositions on behalf of defendant filed.
"	"	"	Depositions on behalf of defendant filed.
"	6,	"	Continued for Sept. Term.
Jan.	15,	1923.	" " Nov. "
Apr.	2,	"	" " Jan. "
June	16,	"	Stipulation & Order fixing time to take depositions filed.
July	27,	"	Depositions on behalf of defendant filed (2).
Aug.	13,	"	Depositions on behalf of defendant filed (2).
"	30,	"	Depositions on behalf of Defendant filed (4).
Sept.	10,	"	Continued for Apr. Term.
"	21,	"	Depositions on behalf of defendant filed.
Oct.	30,	"	Testimony on behalf of defendant filed (2).
"	"	"	Appearances for Plaintiff filed.
"	"	"	Stipulation re Record filed
"	"	"	" " " "
"	"	"	Admission of Genuineness of Exhib- its filed.
"	"	"	Trial before the Court.
Oct.	31,	"	Amendment to Bill of Complaint filed.
"	"	"	Amendment to Answer filed.
"	"	"	Stipulation as to Exhibits filed.
"	"	"	" " " "
"	"	"	Trial continued.
Nov.	1,	"	" " Ordered adjourned to day to be fixed.
Oct.	31,	"	Affidavits for Defendant filed (3).

Oct.	31,	1923.	Stipulations filed (3).
Jan.	8,	1924.	Trial continued.
"	9,	"	" " Decision reserved.
May	7,	"	Opinion filed.
June	17,	"	Final Decree dismissing Bill without Costs, filed.

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UNITED STATES OF AMERICA, }  
 DISTRICT OF NEW JERSEY, } ss.:

I, GEORGE T. CRANMER, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original docket entries on file, and now remaining among the records of the said court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said court, at Trenton, in said District, this 17th day of December, nineteen hundred and twenty-four.

(Seal)

GEORGE T. CRANMER,  
*Clerk, District Court, United States.*

By R. S. CHEVRIER,  
*Deputy.*

IN THE  
DISTRICT COURT OF THE UNITED STATES

DISTRICT OF NEW JERSEY.

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<b>BEECH-NUT PACKING COMPANY,</b>	Plaintiff,	
vs.		
<b>P. LORILLARD COMPANY,</b>	Defendant.	

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In Equity  
No. 3056.

**Bill of Complaint.**

Beech-Nut Packing Company, a New York corporation, having its principal place of business and doing business at Canajoharie, New York, brings this its bill of complaint against P. Lorillard Company, a New Jersey corporation, having its principal place of business and doing business in the City and State of New York.

And plaintiff says:

1. Beech-Nut Packing Company is a corporation of New York, having its principal place of business in Canajoharie, New York. P. Lorillard Company is a corporation of New Jersey, having its principal place of business in the City and State of New York. The amount in controversy herein is more than five thousand dollars (\$5,000.00), irrespective of interests and costs.



2. Plaintiff's predecessor, Imperial Packing Company, a corporation of New York, inaugurated its business prior to 1892 or thereabouts. For the purpose of identifying goods made by it and distinguishing the same from all other goods, plaintiff's predecessor, prior to 1892, adopted and has ever since used continuously, the trade-mark "BEECH-NUT"; and a trade-mark or distinctive badge, comprising the collocation of the trade-mark "BEECH-NUT," with other distinctive and conspicuous features; and particularly has adopted a label, comprising a red and white border, within which is an outline oval (generally in blue), within which outline oval appears the word "BEECH-NUT" (generally in blue) curved about within the upper part of the oval, below which word appears a pictorial representation of a beech-nut cluster, located in the center of the outline oval, with symmetrically arranged small type printing on either side of said pictorial representation; while the name of the particular product to which the label relates is applied symmetrically with the name "BEECH-NUT" on the lower part of the label, all as more perfectly presented by the two specimen labels attached hereto as Beech-Nut Packing Company Exhibit A<sup>1</sup>.

3. In 1899 or thereabouts, plaintiff, desirous of acquiring, developing, and extending the business of the Imperial Packing Company; and particularly having in mind the addition from time to time of successive new items each different specifically from preceding items of its manufacture; and therefore particularly desirous that the reputation of those goods be synonymous with the reputation of their maker; and that it be known to the public in a distinctive and personal sense, discarded the name "Imperial Packing Company" and adopted as the distinctive part of its corporate name the trade-mark "BEECH-NUT." Then and ever thereafter, plain-

tiff, "Beech-Nut Packing Company," has successfully striven to cause the trade and the public to recognize and accept, and the trade and public have recognized and accepted the label, Exhibit A, as not only the trade-mark by which the desired manufacturer of this or that goods may be identified, but also and more particularly as the distinctive autograph or personal signature of the Beech-Nut Packing Company (appearing in unmistakable form on any and all of scores of items), and as indicating the personal responsibility of the known Beech-Nut Packing Company for any goods so marked.




4. In 1899 was formed plaintiff corporation "Beech-Nut Packing Company," which by purchase acquired all of the assets, trade-marks and good-will of "Imperial Packing Company," plaintiff's predecessor, and continued the business, established prior to 1892 by said Imperial Packing Company.

5. Plaintiff's predecessor, Imperial Packing Company, then dealing in certain meat products, shortly after 1891 began a rapid extension of the items of its manufacture; and plaintiff from the time of its acquisition of the business has persistently and rapidly continued that extension. The business of plaintiff by reason of the expenditures, care, skill and industry of plaintiff increased with great rapidity, so that prior to the acts herein complained of, plaintiff's trade-mark, trade name, and distinctive badge and autograph were familiar to and highly regarded by the public, and on sale largely, in stores dealing in package consumable products such as general stores, grocery stores, drug stores, tobacco stores, news stands, and the like; its business aggregated many millions of dollars every year, and comprehended a very large number of packaged products of widely varying character, such as chewing gum, ham, peanut butter, jellies, and scores of

others. Plaintiff has since added many new products to its line, as for instance ginger ale and tin foil, and has always expected and now expects and intends, in the rapid expansion of its business, to continue so to do, all without reference to specific similarities or differences between the various items included in plaintiff's line. Plaintiff's goods and those of its predecessor have always been identifiable by the trade-mark, trade name, distinctive badge, and autograph (Exhibit A<sup>1</sup>, *supra*).

6. Plaintiff's business has for many years prior to the acts herein complained of been in large measure dependent upon the standing in the mind of the public of its trade-mark "BEECH-NUT," and that of its trade name, badge and autograph (Exhibit A<sup>1</sup>). The aforesaid trade-mark, badge and autograph, Exhibit A<sup>1</sup>, except for variations in size, name of particular product and other immaterial variations, has been displayed conspicuously by plaintiff without exception upon all of the widely varying kinds of packaged consumable goods plaintiff has from time to time put upon the market. Plaintiff in the expansion of its business has expended more than two millions of dollars in advertising, including substantially every known kind of advertising, such as advertising in periodicals and newspapers, upon billboards, by display cards, circulars and other ways. The aforesaid advertising has in particular always featured and has forcibly impressed upon the mind of the public the trade-mark and trade name "BEECH-NUT" and the distinctive badge and autograph of plaintiff (Exhibit A<sup>1</sup>); as by its presence on any consumable product indicating that that product, so marked, was of plaintiff's manufacture, and of the same high standard of excellence as that of all other products similarly marked, regardless of specific difference be-

tween the widely varying items from time to time offered by plaintiff.



7. By reason of the foregoing, of the care, skill and industry and expenditures of plaintiff; and by reason of the high regard enjoyed by plaintiff's trade-mark and trade name "BEECH-NUT," distinctive badge and autograph (Exhibit ) , it came about (long prior to the beginning of the acts herein complained of) that the trade and public of the United States recognized the label Exhibit  as plaintiff's distinctive badge and as plaintiff's personal autograph; and as indicating that any consumable packaged product bearing aforesaid badge, trade-mark and trade name and appearing upon the shelves of a retailer alongside other products bearing the same badge, was of the same origin as those other products and of the same high standard of excellence. Each new product so marked was long prior to 1915, and thereafter, and is now, received with immediate and marked favor by the public, by reason of the public's gratification and satisfaction with the previous products, similarly identified, by reason of the high regard the public had for plaintiff, and without such sales resistance as meets the ordinary merchandizing of a new product. By maintaining its standards of quality, at the cost of the most indefatigable and zealous effort, plaintiff has been and is enabled to maintain a large and growing demand for the goods of its manufacture, identified as of its manufacture by the trade-mark, badge and autograph, Exhibit .


8. The outline oval, containing the word "BEECH-NUT" and the pictorial representation of a beech-nut cluster, has been recognized and registered in the United States Patent Office as plaintiff's trade-mark and protected therein by registration grant 89,613, registered December 31, 1912, a copy of said registration being af-

fixed hereto and marked Exhibit <sup>4</sup>~~B~~; said registration specifies about sixty-seven products of widely varying character (some thereof being edible and others not, but all being packaged consumable products), as those upon which as early as 1912 the aforesaid trade-mark had appeared. The said trade-mark was so registered under due form of law largely so that the public and other manufacturers might be informed of the rights of plaintiff in the premises, and of the many items of wide variety, upon which plaintiff then had employed and was employing said trade-mark, and of the fact that some or all of said items distinguished to be of plaintiff's manufacture would be likely to be found offered for sale in any store dealing in packaged consumable products designed to gratify the taste or satisfy the appetite of the purchasing public.

9. Defendant, well knowing the premises, and contriving to injure plaintiff, to cramp the legitimate expansion of its business, and divert from its profits gains and advantages which otherwise would accrue to plaintiff, to the irreparable and vast damage of plaintiff has infringed plaintiff's trade-mark, appropriated plaintiff's trade name and forged plaintiff's autograph; and has been guilty of unfair competition in trade against plaintiff. These acts and doings of defendant have been wilfully and fraudulently performed in spite of plaintiff's remonstrance and request that they be discontinued; and defendant now threatens and intends not only to continue but to aggravate its injury to plaintiff and will do so unless prevented by this court.

10. Thus defendant in the District of New Jersey, and elsewhere throughout the United States, without leave or license from plaintiff and against its protest, has been and is engaged in the manufacture and sale (in commerce among the several states) of a product

known as "*Beech-Nut*" *Scrap Tobacco*, a cheap tobacco made of "scrap" for tobacco chewing, upon which product, as packaged for the consumer and the retailer, is prominently displayed a fraudulent imitation of the distinctive label of plaintiff (Exhibit ); a specimen of said imitative label appears affixed hereto as Exhibit ; to the confusion of the trade and the public, who are likely to, and in fact have generally believed that the so-called "*BEECH-NUT*" *Scrap Tobacco* is another extension of plaintiff's line, and a product made by plaintiff. Defendant in so doing, and in its sales effort with respect to the so-called "*BEECH-NUT*" *Scrap Tobacco*, has been guilty of trade-mark infringement and of unfair competition in trade and has promoted and caused confusion in the trade to its own illegitimate profit and to the vast and irreparable loss, damage and injury of plaintiff.

11. Plaintiff (and its predecessor) by thirty years of cumulative, persistent, indefatigable effort of an organization now numbering many hundreds of individuals, and by the expenditure of more than two millions of dollars in advertising, has established its label, Exhibit , as indicating plaintiff's manufacture wherever it appears, thereby denoting the highest quality that can be obtained, with respect to cleanliness and general supreme desirability of any consumable product bearing that label. This reputation of plaintiff, associated with the aforesaid label, is nowhere better established than among the most refined and prosperous of the female members of the public. Among these persons, as well as to a substantial extent among the public in general, chewing tobacco is regarded with disfavor. Recognition as a manufacturer of chewing tobacco (particularly a cheap scrap tobacco) is not compatible with the standing plaintiff has achieved either in the minds of



its female customers or in the minds of the public. Yet such recognition of plaintiff as a manufacturer of cheap chewing tobacco has been and will be the inevitable result of defendant's imitation of plaintiff's label, Exhibit A. Furthermore, such recognition has and will jeopardize plaintiff's standing with a considerable body of plaintiff's trade (*i. e.*, retailers and jobbers), both through prejudice, among members of that trade, against chewing tobacco, and also through a lowered respect for plaintiff's intelligence which has been and will be the result of plaintiff's being believed in its trade to have embarked on the manufacture of cheap chewing tobacco, in spite of the totally inconsistent and opposite standing and reputation of plaintiff. Plaintiff's position substantially at the top of a highly competitive industry, is a fragile and precarious one, requiring intense, persistent, and indefatigable effort for its maintenance; and has been and will be irreparably damaged by the injuries just referred to.

12. Defendant, desirous of aggravating its injury to plaintiff, has recently begun a campaign of poster and billboard advertising which blatantly displays the label used by defendant (Exhibit B). This advertising has been and is likely to be generally attributed to plaintiff. This advertising in effect conspicuously forces upon the attention of the public (including plaintiff's female customers) what purports to be the fact that plaintiff is manufacturing cheap chewing tobacco. The said blatant billboard advertising of defendant is likely to counteract and destroy the good-will and reputation, for many years laboriously built up and maintained with zealous care, indefatigable effort and at enormous expense by plaintiff.

13. Defendant further aggravating its injury hereinabove complained of and desiring still further wrong-

fully to exploit the good-will of the purchasing public toward any packaged consumable product bearing plaintiff's trade-mark, trade name and autograph, without leave or license from plaintiff, but over its protest and against its will intends, is prepared, and threatens to flood the market (and engage in commerce among the several states) with a so-called "BEECH-NUT" cigarette, upon the retail package of which is displayed prominently (as shown in Exhibit ~~S~~ hereto attached), a close imitation of plaintiff's trade-mark, trade name, distinctive badge, and autograph. In so doing defendant threatens, and the result of such acts and doings will inevitably be, to cause the public to believe that the cigarettes whose packages are so marked are made by plaintiff, and to buy the same in that belief, to the illegitimate profit of defendant and the loss of plaintiff. These acts constitute threatened trade-mark infringement and threatened unfair competition in trade toward plaintiff.

14. Plaintiff (and its predecessor) in the legitimate extension of its lines for the past thirty years or thereabouts, has in rapid succession added from time to time new packaged consumable products of widely varying character, all however sold under the same trade-mark, trade name and autograph. In its national, persistent, long continued and enormous advertising, utilizing practically every known means of appealing to the trade and the public, through which advertising in part plaintiff's business has been developed, plaintiff has conveyed for many years to the public the impression of "quality" as associated with any packaged consumable product which bore plaintiff's label, Exhibit ~~A~~<sup>1</sup>. Thus the term or slogan "Beech-Nut Quality" has been used very largely by plaintiff in advertising both verbatim and by words containing inevitable inference of

the same meaning. And this slogan has been and is recognized by the public, when associated with the name "Beech-Nut," in general as denoting plaintiff's products, regardless of the particular character of any specific goods within the field of packaged consumable products. Thus, furthermore, as a part of plaintiff's sales efforts, by enormous national advertising and otherwise, in the legitimate and continuous actual and prospective expansion of its business by the inclusion of new items, plaintiff has caused the public to believe that plaintiff would never put out a new product unless and until plaintiff had so mastered the art of making that product that the product was of "Beech-Nut Quality."

15. Defendant, desirous still further of promoting confusion in the trade and of illegitimately converting to its own uses the good-will and reputation of plaintiff, has caused to be printed upon its imitative cigarette wrapper, approximately a million of which defendant has had printed and is ready to launch onto the market (Exhibit C), a panel containing the inscription:

"Cigarettes of Beech-Nut Quality have never before been offered to the Public";

thereby and in conjunction with the imitation of plaintiff's distinctive badge and autograph still further working to promote the belief, on the part of the public, that defendant's cigarettes are merely another of the widely varying additions to plaintiff's line which have appeared before the public in rapid succession for substantially thirty years. Defendant is thus guilty of threatened unfair competition in trade with plaintiff, and of illegitimately preparing to appropriate the good-will of plaintiff's business to promote the sale of its own goods, offered to the public in false and misleading dress.

16. Defendant, desirous still further of promoting confusion in the trade, and of converting to its own uses the good-will of plaintiff, has sold and offered for sale in commerce among the several states, large quantities of cigarettes bearing a close and fraudulent imitation of plaintiff's trade-mark, trade name and autograph, as exhibited in Exhibit ~~N~~<sup>S</sup> hereto attached, and has advertised said cigarettes extensively by advertising of a misleading character; said cigarettes have largely been purchased by persons who believed that they were of plaintiff's manufacture; all of which defendant persists in doing in spite of requests by plaintiff that it desist, and will continue to do in large and increasing measure unless prevented by this court. These acts and doings of defendant constitute trade-mark and trade name infringement and unfair competition in trade, and work irreparable injury to plaintiff.

17. Packaged tobacco and cigarettes are both within the legitimate field of expansion of plaintiff's business. Defendant by imitating plaintiff's trade-mark, trade name and autograph is attempting illegitimately to limit and shut off the expansion of plaintiff's business, as well as to damage and injure plaintiff as previously stated.

18. By reason of its acts and doings, defendant has gained large profits; those profits are largely, if not altogether, the result of defendant's conversion and exploitation of plaintiff's good-will, and unwarranted use of plaintiff's trade-marks, trade name and autograph; and of defendant's unfair competition; these profits therefore belong to plaintiff. The aforesaid profits are distinct and separable from the damage done plaintiff by defendant.

Plaintiff therefore prays the court:

First: That an injunction issue out of this court,

enjoining defendant, its officers, agents, employees, confederates and associates from

(a) Using, selling or offering for sale tobacco products under the trade-mark "BEECH-NUT" in any form;

(b) Displaying the name "BEECH-NUT" in its advertising;

(c) Displaying the imitative badge or label, Exhibit B, either in that form or in colorable imitation thereof, on any of its goods or advertisements;

(d) Using, selling, or offering for sale cigarettes under the imitative label Exhibit C, or under the name "Beech-Nut";

(e) Using in association with the name "Beech-Nut" the slogan "Beech-Nut Quality" in any form; and

(f) Enjoining defendant to deliver up and destroy all the infringing label tags, cartons, advertisements, placards, signs and other display devices containing the infringing mark.

Second: That the cause be referred to a Master to take an accounting to determine the profits defendant has made out of its infringement and unfair competition, and the damages suffered thereby by plaintiff; and that plaintiff recover said profits and threefold damages from defendant.

Third: That plaintiff recover its cost herein as taxed by the clerk.

Fourth: For such other and further relief as the court may deem it proper to grant.

And forasmuch as your orators can have no adequate relief save in this court, to the ends therefore that defendant may, if it can, show why your orators should not have the relief hereby prayed, and may (but not under oath—answer under oath being waived), ac-

according to the best and utmost knowledge, information and belief of its officers, full, true and perfect answer make to the premises and to all of the several matters hereinbefore stated and charged as fully and particularly as if severally and separately interrogated as to each and every of said matters.

May it please your Honors to grant unto plaintiff a writ of subpoena *ad respondendum* issued out of and under the seal of this court, directed to said defendant, P. Lcrillard Company, at New York, New York, commanding it by a certain day and under a certain penalty to be and appear in this Honorable Court, then and there to answer to the premises, and to stand to and abide by such order and decree as may be made against it.

Plaintiff will ever pray.

BEECH-NUT PACKING COMPANY,

By F. E. BARBOUR.

OFFFIELD, POOLE & HINTON,

Solicitors for Plaintiff.

JAMES R. OFFFIELD,

CHARLES H. POOLE,

SEBASTIAN HINTON,

PHILIP B. ADAMS,

Allendale, N. J., or 21 Park Row, New York City.

Of Counsel.

*State of New York, County of Montgomery, ss:*

F. E. Barbour, being first duly sworn, says that he is vice-president of Beech-Nut Packing Company, plaintiff herein; that he has read the bill of complaint and inspected the exhibits therein referred to, and that the statements in the bill of complaint are true of his own knowledge, except such statements as

in the bill of complaint are said to be made on information and belief; and as to such statements he believes the same to be true.

F. E. BARBOUR.

Subscribed and sworn to before me this 27th day of May, A. D. 1921.

E. W. SHINEMAN,  
Notary Public.

EXHIBIT A.1



MINT FLAVORED		ALWAYS REFRESHING
<p>You will like Beech-Nut Mints and Fruit Drops in handy pocket packages.</p>		
MINT FLAVORED		ALWAYS REFRESHING
<p>COPYRIGHT 1916 BY BEECH-NUT PACKING CO., CANAJOHARIE, N.Y. AND BROOKLYN, N.Y., U.S.A.</p>		







## UNITED STATES PATENT OFFICE.

BEECH-NUT PACKING COMPANY, OF CANAJOHARIE, NEW YORK.

TRADE-MARK FOR CERTAIN FOODS.

89,613.

Registered Dec. 31, 1912.

Application filed March 22, 1909. Serial No. 41,324.

## STATEMENT.

*To all whom it may concern:*

Be it known that BEECH-NUT PACKING COMPANY, a corporation duly organized under the laws of the State of New York, and located and doing business at Canajoharie, county of Montgomery, in said State, has adopted for its use the trade-mark shown in the accompanying drawing, the annular band being red, for cured ham, bacon, beef, codfish, and herring, sausage, Camembert cheese, pimento-cheese, Roquefort-type cheese, peanut-butter, canned beans, canned bacon and beans, canned beans with tomato sauce, canned bacon and beans with tomato sauce, canned beans and selected pork, malt vinegar, cider vinegar, olive-oil, gelatin, tomato catsup, prepared mustard, strawberries, raspberries, and cherries preserved in syrup, grape, quince, fig, peach, blackberry, raspberry, strawberry, cherry, and plum jams, blackberry, pineapple, huckleberry, cherry, and ginger pear preserves, cranberry sauce, olives, orange, grape-fruit, rhubarb, and lime-fruit marmalades, spiced plums, preserved Persian and Fard dates and figs, quince, apple, black-currant, grape, crabapple, and red-currant jellies, peppermint, lime, wintergreen, clove, cinnamon, lemon, horehound,

and anise cut candies, wintergreen, mint, and vanilla cream candies, and chewing-gum, all in Class 46, Foods and ingredients of foods.

The trade-mark has been continuously used in the business of said corporation, and in the business of its predecessor, the Imperial Packing Company, since the latter part of the year 1899.

The said corporation is the owner of the following trade-mark registrations in the United States Patent Office:—Imperial Packing Company, No. 19,838, July 7, 1891; Imperial Packing Company, No. 24,978, July 3, 1894; Beech-Nut Packing Company, No. 35,731, Jan. 8, 1901; Beech-Nut Packing Company, No. 36,444, May 21, 1901.

The trade-mark is applied or affixed to the goods or to the packages containing the same by placing thereon a printed label on which the trade-mark is shown, and by branding the goods, or the boxes or cases in which the said goods or packages are shipped, with an impression showing the said trade-mark.

BEECH-NUT PACKING COMPANY,  
By BARTLETT ARKELL,  
*President.*



## DECLARATION.

State of New York county of New York ss.

BARTLETT ARKELL, being duly sworn, deposes and says that he is the president of the corporation applicant named in the foregoing statement; that he believes the foregoing

statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the

right to use said trade-mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States, and between the United States and foreign nations, and particularly with Great Britain and France; that the drawing presented truly represents the trade-mark sought to be registered; and that the speci-

mens show the trade-mark as actually used upon the goods.

BARTLETT ARKELL.

Subscribed and sworn to before me, a notary public, this 25th day of September, 1912.

[L. S.] S. V. MORRIS,  
*Notary Public, 121, New York County.*  
*Register's No. 3236.*

EXHIBIT 1. 5



IN THE UNITED STATES DISTRICT COURT, DISTRICT OF  
NEW JERSEY.

Beech-Nut Packing Company }  
vs. } In Equity No. 3056.  
P. Lorillard Company.

**Stipulation.**

It is stipulated by and between the parties, through their respective counsel, that plaintiff's time for pleading to the answer and answering to the counterclaim may be extended an additional twenty days beyond the thirty days extension now appearing by stipulation in the record, or until October 15, 1921, and that the plea to the answer and answer to the counterclaim when filed may be filed *nunc pro tunc* as of the date August 16, 1921, to take precedence over the testimony taken in this case.

OFFIELD, POOLE, HINTON & SCOTT,  
Counsel for Beech-Nut Packing Co.  
MEYERS, CAVANAGH, WHITEHEAD & HYDE,  
Counsel for P. Lorillard Company.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF  
NEW JERSEY.

Beech-Nut Packing Company }  
vs. } In Equity No. 3056.  
P. Lorillard Company.

**Stipulation.**

It is stipulated by and between the parties hereto that the answer to the counterclaim in the above entitled suit, attached hereto, may be filed as of the date

of August 16, 1921, to take precedence over the testimony herein taken, as per the stipulation of August 16, 1921, appearing in the record of said testimony and the stipulation of September 26, 1921.

OFFIELD, POOLE, HINTON & SCOTT,  
Counsel for Beech-Nut Packing Co.  
MEYERS, CAVANAGH, WHITEHEAD & HYDE,  
Counsel for P. Lorillard Company.

Approved:

J. L. BODINE,  
U. S. District Judge.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF  
NEW JERSEY.

Beech-Nut Packing Company }  
vs. } In Equity No. 3056.  
P. Lorillard Company. }

**Answer to Defendant's Counterclaim.**

Plaintiff answering defendant's counterclaim, or so much thereof as it is advised is material and necessary to be answered, answering says:

I. (Paragraph 20 of Answer.) Plaintiff denies that defendant is the owner of the trade-mark "Beech-Nut" for tobacco products of all kinds, including cigarettes, and that for many years prior to the acts of plaintiff referred to, this defendant and its predecessors in business had and has manufactured and marketed tobacco products under the trade-mark "Beech-Nut" in vast quantities of a value running into millions of dollars. Plaintiff denies that the alleged predecessors were predecessors of defendant with respect to the alleged trade-mark "Beech-Nut." Plaintiff says that the first considerable quantity of Beech-Nut Tobacco ever manu-

factured either by plaintiff or its alleged predecessors, and the first quantity of value even comparable with the sum of a million dollars was sold by defendant subsequently to the beginning of the year 1915. Plaintiff admits that the value of the subject-matter in controversy is in excess of five thousand dollars (\$5,000.00), but denies that the trade-mark "Beech-Nut" is defendant's trade-mark for tobacco or any other product. Plaintiff denies that the trade and public in general or that the tobacco trade, or the tobacco using public has ever recognized the trade-mark "Beech-Nut" for tobacco products to be that of defendant. Plaintiff denies that by reason of the long experience and great care of defendant in its tobacco business and the superior quality and character of its tobacco products and particularly its tobacco products sold under its trade-mark "Beech-Nut," such "Beech-Nut" tobacco products of defendant had become widely known in the community and throughout the various states of the United States and have commanded and still command an extensive sale throughout the various states of the United States; plaintiff asserts that the aforesaid sales are due to the use of plaintiff's trade-mark and trade name and the imitation of plaintiff's label by defendant and not at all to anything else contributed by defendant. Plaintiff admits that the sale of the aforesaid tobacco products has been a source of great profit to this defendant.

Plaintiff denies that this defendant or its predecessors ever enjoyed a long and quiet use of the trade-mark "Beech-Nut" for tobacco products. Plaintiff denies that, well knowing the premises and with the preconceived intention to injure the defendant and with the purpose to defraud it, and with the purpose to deprive this defendant of any legitimate benefits and profits resulting from the alleged reputation acquired by its



"Beech-Nut" tobacco products and with the intent to acquire for itself the benefits and profits of defendant's reputation and with the intent to assist others to palm off on the public tobacco products, particularly cigarettes, under the name "Beech-Nut," not manufactured or sold by the defendant and in wilful disregard of defendant's rights in the premises, that it has recently but prior to the filing of the bill of complaint and the answer, to-wit, since about June or July, 1919, manufactured or caused to be manufactured and endeavored to sell within the District of New Jersey and elsewhere in the United States, and now threatens to sell within the District of New Jersey and elsewhere, an inferior grade of cigarettes under the trade-mark "Beech-Nut" with the intent to deceive and defraud the public, to injure the reputation of defendant and particularly in connection with its Beech-Nut tobacco products, such as scrap tobacco and cigarettes and to reap and receive for this plaintiff's own benefits and profits, the gains lawfully due defendant. Plaintiff denies that any act or deed done by plaintiff is an infringement or threatened infringement of any right of defendant in the premises or of any right in defendant in its alleged trade-mark "Beech-Nut" as applied to tobacco products.

II. (Paragraph 21 of the Answer.) Plaintiff denies that in pursuance of an unlawful policy of infringement or of threatened infringement of defendant's rights in the premises, this plaintiff with full knowledge of the fact that defendant or its predecessors had for many years manufactured and marketed tobacco products under defendant's trade-mark "Beech-Nut," manufactured and shipped or caused to be manufactured and shipped an inferior grade of cigarettes, packaged as described in the aforesaid paragraph of the counter-

claim. Plaintiff denies that cigarettes so packaged were shipped into the District of New Jersey and attempted to be sold therein. Plaintiff admits that certain cigarettes made for it did not bear plaintiff's alleged label, Plaintiff's Exhibit A, but states that they did bear plaintiff's trade-mark "Beech-Nut." Plaintiff denies that such cigarettes presented such a cheap appearance that if permitted to be sold they would and will operate to the injury and damage of defendant's reputation, particularly with relation to its "Beech-Nut" tobacco products. Plaintiff admits that it filed in the United States Patent Office an application for registration of the trade-mark "Beech-Nut" for cigarettes as described in the counterclaim, but denies that such application was filed in pursuance of any unlawful policy or with full knowledge of defendant's alleged prior adoption or exclusive right in the trade-mark "Beech-Nut" for tobacco products. Plaintiff admits that defendant filed opposition, that it filed answer, that testimony was taken, as stated in the counterclaim, but denies that defendant has any rights in the premises.

III. (Paragraph 22 of the Answer.) Plaintiff denies that the alleged acts, threats and intention of plaintiff are in disregard of defendant's rights in the premises or that they will have the effect to and will encourage others to interfere with defendant's alleged trade-mark "Beech-Nut" for tobacco products or to disregard its rights, or that it will result in any irreparable damage and injury and loss to defendant, except such damage, injury and loss as may be involved in preventing defendant from continuing to perpetrate a fraud and injury on plaintiff and the public.

Plaintiff claims the right to merchandise packaged consumable products such as cigarettes under its own trade-mark "Beech-Nut," and particularly under its own

label and autograph, used by it for many years on scores of packaged consumable products, if it should see fit at any time to do so.

Plaintiff, having therefore fully answered to the afore-said counterclaim and to so much thereof as it is advised is material and necessary to be answered, prays that the counterclaim may be dismissed, together with the prayer therein for relief, and that plaintiff be with respect to such counterclaim hence dismissed with its costs in this behalf most wrongfully expended.

BEECH-NUT PACKING COMPANY,  
By OFFIELD, POOLE, HINTON & SCOTT,  
Attorneys for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT  
OF NEW JERSEY.

Beech-Nut Packing Company,	} In Equity No. 3056.
<i>Plaintiff,</i>	
<i>vs.</i>	
P. Lorillard Company,	}
<i>Defendant.</i>	

Depositions taken on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before L. W. DePass, a notary public within and for the County of Suffolk, Commonwealth of Massachusetts, acting as Special Examiner by consent of counsel, at the Chamber of Commerce building, Boston, Massachusetts, and the Touraine Hotel, Boston, Massachusetts, beginning the sixteenth day of August, A. D. 1921, at 10 o'clock A. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, attorneys for the Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, attorneys for P. Lorillard Company.

HARRY S. COHEN, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Harry S. Cohen; 236 Chestnut Street, Chelsea, Massachusetts; age, 19.

Q. 2. What is your occupation?

A. Salesman.

Q. 3. Where are you employed?

A. L. K. Liggett, 15 Huntington Avenue, Boston, Mass.

Q. 4. And what products do you sell?

A. Cigars, cigarettes, tobacco and that line.

Q. 5. Are you employed behind the cigar counter in the Liggett store?

A. I am.

Q. 6. Is that a drug store?

A. Drug store; yes.

Q. 7. I show you a package of cigarettes which is in evidence in this case as Beech-Nut Exhibit No. 1. Have you sold these cigarettes over your counter? If so, please state when you first began selling them.

A. Why, we began about the early part of April, I believe.

Q. 8. 1921?

A. 1921.

Q. 9. Will you state when you began selling these cigarettes, or offering them over your counter, you heard any remarks, comments, inquiries or the like from the public over the counter about these cigarettes?

A. They would say if Beech-Nut gum is as good as the cigarettes, they would buy them.

Q. 10. Well, Mr. Cohen, which of these products were on sale first, the gum or the cigarettes?

A. The gum.

Q. 11. Was the gum a new product, or were the cigarettes a new product?

A. The cigarettes.

Q. 12. Had the public been buying the gum?

A. They were.

Q. 13. Please state whether or not Beech-Nut gum was a good seller in your store.

A. It was a good seller.

Q. 14. Was this true prior to the appearance of the cigarettes?

A. I think so.

Q. 15. Will you listen to the reading of your previous answer: "They would say if Beech-Nut gum is as good as the cigarettes they would buy them." Is that what you meant?

A. No; that was an accidental mistake. What I meant is that they would say, "If the Beech-Nut cigarettes are as good as the Beech-Nut chewing gum, then they will buy the cigarettes."

Q. 16. Please state any other remarks that you heard over the counter when the cigarettes were first offered.

A. Well, people wanted to know whether the Beech-Nut gum manufacturers were the same people that put out the cigarettes.

Q. 17. Will you state what proportion of your customers made these kind of remarks, if you can remember, when the cigarettes were first offered?

A. Well, two-thirds of the people would make them like that.

Q. 18. Did you ever have people come into your store and ask for Beech-Nut?

A. Yes.

Q. 19. And what would you do?

A. I would ask them whether they wanted the cigarettes or the gum.

Mr. Hinton: That is all.

*Cross-Examination.*

X-Q. 20. (By Mr. Cavanagh.) How old did you say you were, Mr. Cohen?

A. 19.

X-Q. 21. How long have you been acting as a salesman?

A. About two years.

X-Q. 22. How long have you been with L. K. Liggett & Company?

A. The same number of years.

X-Q. 23. How long have you been selling the tobacco line with Liggett?

A. About eighteen months.

X-Q. 24. Did you start in directly in the tobacco line when you went to work, or did you have some other line first?

A. Some other line.

X-Q. 25. What was that?

A. Jewelry.

X-Q. 26. Jewelry?

A. Well, that was with my father.

X-Q. 27. So when you went to work with Liggett & Company, you started right behind the cigar and tobacco counter?

A. No, I was in the soda department for a short while.

X-Q. 28. And subsequently you went to selling the tobacco line behind the counter?

A. Yes.

X-Q. 29. Now, how many people are employed in this store where you are in Liggett's, 15 Huntington Avenue?

A. Well, there are about twelve.

X-Q. 30. And how many are there behind the cigar and tobacco counter?

A. Well, there is myself and others that help me out when I am away.

X-Q. 31. You mean relief?

A. Relief.

X-Q. 32. You say you sell all sorts of cigars, cigarettes and tobacco?

A. We do.

X-Q. 33. You are familiar with the various lines?

A. I am.

X-Q. 34. Do you know who makes the Beech-Nut cigarette?

A. So far as I know, the Lorillard Company.

X-Q. 35. That is known as Lorillard's brand?

A. Yes.

X-Q. 36. Do you know who makes the Egyptian Deity cigarette?

A. It is the same people, I believe, or S. Anargros.

X-Q. 37. Do you sell scrap tobacco, chewing tobacco?

A. Yes.

X-Q. 38. What kind?

A. B. L., and Climax—plug, that is.

X-Q. 39. I show you a package of tobacco which is known as scrap tobacco and which is in this case as Defendant's Cross-Exhibit No. 1. Did you ever see a package of tobacco like that?

A. I have seen it, yes.

X-Q. 40. Whose tobacco is that?

A. Lorillard's.

X-Q. 41. That is known in the tobacco market as Lorillard's tobacco?

A. Yes.

X-Q. 42. Who makes Beech-Nut chewing gum that you sell?

A. The Beech-Nut Packing Company, I think. I don't know just who makes that. So far as I know it is not the same people who put out the cigarettes.

X-Q. 43. Reverting to this package of scrap tobacco, Defendant's Cross-Exhibit No. 1, which I showed you a moment ago, is there anything on that package to indicate that it is Lorillard's?

A. Yes.



X-Q. 44. What is that?

A. That name on the package (indicating).

X-Q. 45. And what is that name?

A. Lorillard.

X-Q. 46. Now, I think you said, Mr. Cohen, that Beech-Nut gum was on the market before Beech-Nut cigarettes. How do you know this?

A. So far as I know.

X-Q. 47. That is simply your personal opinion?

A. Yes.

X-Q. 48. I think you also said that when the Beech-Nut cigarette was first put on sale in Liggett's store, at 15 Huntington Avenue, two-thirds of the customers asked if it was the same people that put out Beech-Nut cigarettes and the gum?

A. Yes.

X-Q. 49. Did you count, or keep track of the number of people that asked you that?

A. I could tell pretty plainly from the customers who would mention the fact.

X-Q. 50. How did you know that practically two-thirds of them mentioned it?

A. Practically every one that came into the store mentioned it.

X-Q. 51. You said two-thirds. How did you reach this conclusion?

A. Well, some would not say it.

X-Q. 52. Did you count them?

A. No, I didn't; it is just my estimate.

X-Q. 53. So you really don't know whether it was two-thirds or not?

A. Well, I could truthfully say it was about that number.

X-Q. 54. You didn't count them, did you?

A. No; you can't count them; you could not possibly do that, you know.

X-Q. 55. At Liggett's store, do you sell Beech-Nut gum?

A. We do.

X-Q. 56. Do you sell it personally?

A. I do.

X-Q. 57. I hand you a small package of gum, which is in this case as Defendant's Cross-Exhibit No. 2. Will you tell me what that is?

A. That is the Beech-Nut gum.

X-Q. 58. What is the color of that label?

A. Yellow.

X-Q. 59. And what is the color of the cigarette label, the background of it?

A. Why—

X-Q. 60. The Beech-Nut cigarette label, the background of it.

A. Red.

X-Q. 61. You would not confuse those two colors, would you, yellow and red?

A. No.

Mr. Cavanagh: I think that is all.

*Redirect Examination.*

R-D. Q. 62. (By Mr. Hinton.) Over what counter in your store do you sell the gum?

A. The candy counter.

R-D. Q. 63. Do you sell that gum personally?

A. Well, when I relieve the candy girl, when she goes out to lunch, I hop over to the candy counter.

Mr. Hinton: That is all.

(Signature waived.)

ROBERT SKENE, JR., a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, being first duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Robert Skene, Jr.; Boston, Massachusetts; 50 years of age; New England representative for Arkell & Smiths Company, Canajoharie, New York.

Q. 2. What does Arkell & Smiths do?

A. They manufacture paper and cotton sacks for flour and feed.

Q. 3. State what, if any, connection you have with the Beech-Nut Packing Company.

A. I have no direct connection with the Beech-Nut Packing Company, but Mr. Arkell, who is president of the Arkell & Smiths Company, is also president of the Beech-Nut Packing Company, and I am intimately acquainted with the whole Arkell family and other officers of the Beech-Nut Packing Company and have been intimately associated with them for 25 years—these people.

Q. 4. Are you known among your friends in Boston as being in some way connected or familiar with the Beech-Nut Packing Company?

A. Everybody here, around the Chamber especially, persistently associates me with the Beech-Nut Company. They seem to think that I have something to do with it in some way, all the time.

Q. 5. By "Chamber," you mean the Chamber of Commerce?

A. Yes, Chamber of Commerce.

Q. 6. I show you a package of Beech-Nut cigarettes,

Plaintiff's Exhibit No. 1 in this case. Have you ever seen these cigarettes before, and if so, when and where did you first see them?

A. Yes, I have seen these. I first saw them at the cigarette stand here in the Chamber of Commerce.

Q. 7. When was that?

A. In the spring of this year.

Q. 8. About what time?

A. The early part of this year.

Q. 9. Were they on sale at that stand when you first saw them?

A. Yes, sir.

Q. 10. Will you please state whether you had heard anything about these cigarettes prior to the time that you actually saw them offered for sale?

A. On the floor of the Chamber quite a number of people came to me and said: "I see that your people are getting out a new cigarette, the Beech-Nut cigarette." And so many persisted in this, making this inquiry of me, "Are you getting out a new Beech-Nut cigarette," that I inquired about where they could be found and I went down to the cigar stand and got a package.

Q. 11. When you first saw these cigarettes, by whom did you think they were made?

A. I thought it was a Beech-Nut Packing Company product.

Q. 12. What made you think that?

A. Well, the Beech-Nut hyphenated, just the same as the Beech-Nut Packing Company do, and the form of the label, and the cluster under the "Beech-Nut" and the whole color scheme, the whole general form of the label.

Q. 13. Now, you stated you went down and bought a package of these cigarettes. Then what did you do?

A. Of course, I examined it and found that the name Lorillard Company was on them.

Q. 14. And what did you then conclude, Mr. Skene?

A. So then I was not sure whether it was a Beech-Nut product or not, but I thought perhaps Lorillard might be putting it out for the Beech-Nut people, and I wrote down to Canajoharie to inquire before I gave any positive information to my friends about it one way or the other.

Q. 15. And then what happened?

A. The Beech-Nut people wrote me that it was not their product, and that they had nothing to do with it. And from that time I informed all friends who made inquiries of me, and who had spoken to me about it, that it was not our product at all.

Q. 16. You said that several of your friends had spoken to you about these cigarettes. Will you state, if you remember, and as carefully as you can, exactly what these people said to you?

A. Well, there were so many different forms that it would be hard, but generally it was "I see that the Beech-Nut people are getting out a cigarette," or, "I see that you have a new brand of cigarettes," or, "Why don't you send us some of your Beech-Nut cigarettes?"

Q. 17. Can you, Mr. Skene, give me the names of any of your friends in the Boston Chamber of Commerce, whom you can remember, who definitely made remarks of that character to you when the cigarettes came out?

A. Well, Fred Godfry—

Q. 18. Will you please also state what these people do, so far as you know?

A. Fred Godfry, John F. Lapham, Dick Pope, Warren Torrey, John King, Billy Wise—is that enough?

Q. 19. I would like to have you mention all you can.

A. Fred Lamb, and a great many others. These

gentlemen are in the flour and grain business, and all of them have offices in the Chamber of Commerce building.

Mr. Hinton: Direct examination closed.

*Cross-Examination.*

X-Q. 20. (By Mr. Cavanagh.) I understand that you are connected with Arkell & Smiths, which in turn is connected with the Beech-Nut Packing Company; is that right?

A. No, not connected with the Beech-Nut Packing Company.

X-Q. 21. Explain their relation.

A. Mr. Arkell, president of the Arkell & Smiths Company, is president of the Beech-Nut Packing Company.

X-Q. 22. Have you been using any of the Beech-Nut Packing Company products?

A. Well, I have been using them along for years.

X-Q. 23. What are those products in general; how would you classify them?

A. Well, they run all the way from Beech-Nut bacon and ham to chewing gum and peanut butter and preserves and jams, and now they are making ginger ale and spaghetti—I don't know how you would class it.

X-Q. 24. Are they food products?

A. Well, yes, in a measure, but I don't know that you would call chewing gum a food product.

X-Q. 25. Do you use tobacco?

A. I do; yes.

X-Q. 26. Are you familiar with the names of any of the big tobacco companies?

A. Oh, I am with the Lorillard name and the American Tobacco Company, and Liggett.

X-Q. 27. What Liggett concern do you know?

A. I just know the Liggett concern in a general way, not especially in regard to the product.

X-Q. 28. Does your work bring you in contact with the tobacco dealers or the tobacco using public?

A. No, sir.

X-Q. 29. When you examined this Beech-Nut package of cigarettes, Plaintiff's Exhibit No. 1, you found the name P. Lorillard Company on it, did you?

A. Yes, down below in small type.

X-Q. 30. Just as it is on the Beech-Nut package of cigarettes, Plaintiff's Exhibit No. 1?

A. Yes, sir.

X-Q. 31. And you didn't find the name Beech-Nut Packing Company anywhere on that package, did you?

A. No, sir.

X-Q. 32. Have you ever examined any of the Beech-Nut Company packages?

A. Well, you mean—you don't mean the packages, you mean—

X-Q. 33. I mean the packages, the same as you looked at this, the Lorillard cigarette package.

A. You don't mean the contents of the package, you mean the outside?

X-Q. 34. Yes, the outside, or dress.

A. Oh, I have seen it so many times that its general form and style is familiar to me, that is all.

X-Q. 35. Does the name Beech-Nut Packing Company appear upon packages of goods put up by this concern?

A. I don't really know.

X-Q. 36. You never looked at a package close enough to find out?

A. No; I have not had occasion to examine them; I have always accepted their packages as Beech-Nut packages without examining them closely.

X-Q. 37. You don't know whether it was made by the Beech-Nut Packing Company or some other concern; is that it?

A. Well, I felt pretty fully assured that it was, that is all. I would not know from examining the name, no—just the general form of Beech-Nut label.

X-Q. 38. So you might take the product of any other concern for that package so far as that name of Beech-Nut is concerned?

A. Yes, if it had Beech-Nut name and label on it, I would take it without examining it very closely.

X-Q. 39. Without ascertaining whether or not their name appeared on it?

A. Yes.

X-Q. 40. I understand you have used tobacco have you?

A. Yes, sir.

X-Q. 41. Do you use chewing gum?

A. Yes.

X-Q. 42. If you went into a store and asked for a package of chewing gum, would you accept a package of tobacco in place of it?

A. No, I should not.

X-Q. 43. You would think a man was crazy who would do that, wouldn't you?

A. No; I might have some reason for it—for accepting it.

X-Q. 44. Supposing you wanted a package of Beech-Nut chewing gum, and nothing else, would you accept a package of cigarettes in place of the chewing gum?

A. I would not accept any other package of gum, for that matter. I have often refused any other kind of chewing gum—if they tried to pass me other gums, I would not have it.

X-Q. 45. Will you just answer my question?



A. Naturally I would not take anything else in place of it, any more than I would take any other article when I asked for something else in any store.

X-Q. 46. So you never would, in your own mind, as a person of intelligence—you would never confuse tobacco with chewing gum, would you?

A. No.

X-Q. 47. When you examined this package of Beech-Nut cigarettes, Plaintiff's Exhibit No. 1, and saw the name P. Lorillard Co. on it, didn't that indicate to you that that package was made by P. Lorillard tobacco people?

A. Yes.

X-Q. 48. Did you ever know the Beech-Nut Packing Company to put out any tobacco product?

A. No.

X-Q. 49. Did you ever see Beech-Nut scrap tobacco?

A. No; I don't recall it. I may have seen the word years ago.

X-Q. 50. Well, I show you a package of it that is in this case as P. Lorillard's Cross-Exhibit No. 1. Did you ever see that package?

A. No.

X-Q. 51. Are you related to any of these gentlemen to whom you referred as having asked you about Beech-Nut cigarettes?

A. No, sir; or to any of the Beech-Nut people.

X-Q. 52. But you are employed by a concern in which Mr. Arkell is an officer, and Mr. Arkell is also an officer of the Beech-Nut Packing Company?

A. Yes.

X-Q. 53. Who is the Beech-Nut Packing Company representative in this section?

A. I don't know; I think his name is Hubbard; I understand his name is Hubbard, but I don't know.

X-Q. 54. So you don't handle yourself any of the Beech-Nut Packing Company products?

A. No, sir.

Mr. Cavanagh: That is all.

*Redirect Examination.*

R-D. Q. 55. (By Mr. Hinton.) Mr. Skene, I wish you would state, if you can remember, after you purchased this package of Beech-Nut cigarettes, and upon examination thereof, as you have testified, found the name P. Lorillard Company on there, what did you conclude?

A. Either that they were being manufactured for the Beech-Nut people by Lorillard, or being distributed by P. Lorillard Company.

Mr. Hinton: That is all.

*Recross-Examination.*

R-X Q. 56. (By Mr. Cavanagh.) Upon what did you base that conclusion?

A. Because of the practice in my business. We get out a great many brands of flour, and we put on who they are manufactured for, or distributed by. It may be that two or three men, different men, use the same flour, but this name indicates who it is distributed by, or how it is put out; but the brand is a well known brand.

R-X Q. 57. Now, just on this point, will you give an example of one such product, the name?

A. Well, take King Arthur flour, on that it says distributed by Sands, Taylor & Wood; that is a well known brand in New England, one of the most popular brands we have, and a fine flour. That flour is made by the Northwestern Consolidated Milling Company.

R-X Q. 58. Now, what other concerns distribute King Arthur flour?

A. Why, nobody; but I know it is sold by a great many people.

R-X Q. 59. And can you give me the name of a flour, for example, which is distributed under the same name by different concerns?

A. No, I can't, offhand.

R-X Q. 60. As I understand it, this flour, King Arthur, has the name of the distributor of it?

A. Yes, sir.

R-X Q. 61. What was the name?

A. Sands, Taylor & Wood.

R-X Q. 62. So Sands, Taylor & Wood have their own name on it, and they are the ones that put the flour on the market?

A. Yes.

R-X Q. 63. Wouldn't you take the name on the package as the name of the party that manufactured the flour?

A. For a long time they didn't have their name on it, only Minneapolis, Minnesota, and that is where the mill was.

R-X Q. 64. Minneapolis, Minnesota, was the only name on it?

A. Yes, sir.

R-X Q. 65. And now they put their own name on?

A. Yes, sir.

R-X Q. 66. So that the name of a concern on a package would indicate the party who puts it on the market?

A. Not necessarily, no.

R-X Q. 67. Well, you saw P. Lorillard's name on this Beech-Nut cigarette, and could you possibly conceive that this was put out by the Beech-Nut Packing Company, if their name was not on it. That is what I am trying to get at.

A. Because I knew P. Lorillard was manufacturing to-

bacco, but I could not conceive that he would use the Beech-Nut label.

R-X Q. 68. Then, the only thing that made you think it was manufactured by the Beech-Nut Packing Company was the words "Beech-Nut" on it?

A. The Beech-Nut, and form of label. The oval form of the label, and the cluster, and the color scheme.

R-X Q. 70. What color scheme?

A. Well, in the form of the label and the red right around it.

X-Q. 71. You mean this red background?

A. No, I mean the label itself.

R-X Q. 72. You don't mean the red background?

A. No, that is the color. I am talking about the label.

R-X Q. 73. Just the oval part?

A. Yes.

R-X Q. 74. You knew that the Lorillard Company put out tobacco and cigarettes, did you not?

A. Yes; I believed they did.

R-X Q. 75. And you never knew the Beech-Nut Packing Company to put out tobacco and cigarettes?

A. No; it was a new matter, so far as I was concerned.

R-X Q. 76. I show you a sheet marked for identification as Defendant's Cross-Exhibit No. 3. Do you recognize that label?

A. Yes.

R-X Q. 77. What is it?

A. It is a Beech-Nut label.

R-X Q. 78. Now, calling your attention to the beech-nut in the center of it, is it like the beech-nut on the Lorillard label?

A. No, but very similar, I would say.

R-X Q. 79. What is the difference?

A. Well, why, in a general way, we would call each of these a cluster, an interior cluster.

R-X Q. 80. The beech-nut is a single beech-nut, isn't it?

A. Yes.

R-X Q. 81. With green leaves?

A. Yes.

R-X Q. 82. Extending over it?

A. Yes.

R-X Q. 83. And the Lorillard label shows just two separate beech-nuts, red and gold; is that right?

A. Yes, sir.

R-X Q. 84. And there is a red oval line around the beech-nut, isn't there?

A. Yes, sir.

R-X Q. 85. And there is no such line around the Lorillard beech-nut, is there?

A. No, sir.

R-X Q. 86. On the wide red band on the label of the Beech-Nut Packing Company, Defendant's Cross-Exhibit No. 3, you find, do you not, at each end a beech-nut imposed on three leaves?

A. Yes.

R-X Q. 87. And you don't find that on the Lorillard cigarette package, do you?

A. No.

R-X Q. 88. And you find on this Beech-Nut Packing Company label, Defendant's Cross-Exhibit No. 3, "Beech-Nut Packing Company, Canajoharie, N. Y., U. S. A.," do you not?

A. Yes, sir.

R-X Q. 89. Do you find that on the Lorillard package?

A. No, sir.

R-X Q. 90. So there is quite a difference?

A. But, nevertheless, the general impression would come to anybody, especially to me, that that is a Beech-Nut label.

R-X Q. 91. But I am asking you, there are quite a few differences?

A. Yes, in these small details that you refer to.

R-X Q. 92. Did you ever know of any Beech-Nut Packing Company's goods to be put out in a label or package with red radiating lines like that—as shown by Lorillard scrap tobacco package, and marked herein Defendant's Cross-Exhibit No. 1?

A. I don't recall it, unless it was in the peanut bar they got out. I think it had a stripe on it, something like that.

Mr. Hinton: The examination in connection with the Defendant's Cross-Exhibit No. 1, Lorillard's Scrap Tobacco, is objected to as outside of the scope of the direct examination.

Mr. Cavanagh: That is all.

Mr. Hinton: That is all.

ROBERT SKENE, JR.

A. W. GODFREY, a witness produced on behalf of the Beech-Nut Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. My name is Alfred W. Godfrey, and I am mill representative, selling mill feeds and flour; my legal residence is Lowell, Mass., and my place of business is 201 Chamber of Commerce, Boston.

Q. 2. Did you give your age?

A. 44.

Q. 3. Do you trade on the floor of the Chamber of Commerce, Boston, Mr. Godfrey?

A. I do.

Q. 4. I show you a package of cigarettes which is in

evidence in this case as Beech-Nut Exhibit No. 1. Have you ever seen those cigarettes before, and, if so, when and where did you first see them?

A. I saw them first on the counter of the cigar stand in the Chamber of Commerce Building.

Q. 5. And when was that?

A. Some time last spring, I should say. I have no definite date in mind.

Q. 6. When you first saw these cigarettes, by whom did you believe that they were made?

A. It came to my mind that they were put out by the Beech-Nut people that put out all the other Beech-Nut goods that I had ever seen.

Q. 7. You may state, if you will, what it was that led you to that belief.

A. The label was such that immediately it brought to my mind the Beech-Nut Packing Company's goods, manufactured at Canajoharie, New York.

Q. 8. Do you now believe that they are made by the Beech-Nut Packing Company?

A. I have been informed that they were not.

Q. 9. When did you first learn that this product was not made by the Beech-Nut Packing Company, and how did you find out?

A. Why, on seeing the package, I immediately got hold of my friend, Mr. Skene, and asked him how long they had been putting out cigarettes by the Beech-Nut people, knowing he was intimately acquainted with them, and he professed absolute ignorance of putting them out. And in due course, I don't know whether it was that day or the next day, but very soon after, I went downstairs and purchased a package of them to see what there was in them, and upon looking them over I saw Lorillard's name on it, and I think it was sometime after that, after talking with Mr. Skene about it, and asking if Lorillard

were putting the cigarettes out for them, and he said he didn't know anything about it, and he came back afterwards and told me, sometime afterwards, that they were not putting them out, he had inquired; and that is how I gained my information, which I supposed was good information.

Q. 10. You used the expression in your last answer that Lorillard was putting the cigarettes out for "them." Who did you mean?

A. Why, the Beech-Nut people, the Beech-Nut Packing Company, whatever their title is, up to Canajoharie.

Q. 11. Will you please state how these cigarettes impressed you, if you remember, in respect to quality, price, and so on, in connection with the many Beech-Nut products with which you have been familiar?

A. Well, I might state it in this way; that my knowledge of the Beech-Nut products had left the impression in my mind that they put out a strictly high-grade class of goods, and you never would expect to buy a Beech-Nut product at a cheap price; that you paid the full value indicated by the high-priced product that they put out. And I noticed they were selling the lowest-priced cigarettes for the number of cigarettes put out that I knew of. In other words, they were selling for 15 cents cigarettes which generally, to my mind, was being sold by everybody else at 20 cents. I won't state it was the cheapest cigarette, but that was the impression that came into my mind. In other words, that they were not the same priced cigarette, according to numbers delivered, that other people were asking 20 cents for the same number of supposedly the same grade of cigarette.

Mr. Hinton: That is all.



*Cross-Examination.*

X-Q. 12. (By Mr. Cavanagh.) Are you familiar with the products put out by the Beech-Nut Packing Company?

A. To some extent.

X-Q. 13. Will you name those products?

A. You mean, can I name all the products that they put out?

X-Q. 14. Yes.

A. No, I can't name them all, because I would probably slip some that I have known about that I don't remember now, but I do know that they put out food products and chewing gum, and such things as that. I have seen them constantly in the different stores. To name them all over, I would not attempt to name all I have seen.

X-Q. 15. Did you ever know the Beech-Nut Packing Company to put out tobacco products?

A. I never heard of it, or thought of it until I saw this label.

X-Q. 16. So you never knew they put out a tobacco product?

A. No; I didn't know all they put anyway.

X-Q. 17. But you didn't know that anyway?

A. No.

X-Q. 18. If you went into a store and wanted a package of chewing gum, would you take a package of Beech-Nut cigarettes in the place of that gum?

A. No sane man would.

X-Q. 19. When you examined the cigarette package, Beech-Nut Exhibit No. 1, you found the name P. Lorillard Co. on it, didn't you?

A. May I ask you what time I examined it—just now?

X-Q. 20. No, when you said you made your examination of it and bought it and looked at it.

A. I didn't say I bought it and looked at it. I said I saw it, I saw the Beech-Nut label on it. I definitely stated I didn't buy it until afterwards.

X-Q. 21. When you did buy it, you examined it carefully, didn't you?

A. Because I had the question raised whether it was put out by the Beech-Nut Packing Company, but I don't know when it came into my mind.

X-Q. 22. When you made your examination, then, you found the name P. Lorillard Co. on it?

A. When I read the package all over I found the name of P. Lorillard Co. on it.

X-Q. 23. You knew that P. Lorillard Co. was a large tobacco manufacturer?

A. I simply knew that P. Lorillard Co. had been in the tobacco business, but in regard to their size, I couldn't state.

X-Q. 24. It is a well known tobacco concern, is it not?

A. Not very well known to me, but I knew that name had been in the tobacco business, because my father sold tobacco at one time years ago; that is how I knew, not because of its market value in the trade.

X-Q. 25. Do you smoke?

A. Very limited.

X-Q. 26. Do you smoke?

A. Mostly cigarettes; I never smoke cigars.

X-Q. 27. What brand of cigarettes do you smoke?

A. Well, I smoke several different brands, mostly 20 in the package, such as Fatimas, Lucky Strike, and any of those in that class, Chesterfields, and any of those like that. I am not a crank on cigarettes, or who makes them.

X-Q. 28. What do you pay for Lucky Strike cigarettes?

A. 25 cents.

X-Q. 29. How many in a package?

A. Twenty cigarettes, if my memory is correct.

X-Q. 30. Do you know what Piedmonts sell for?

A. No, I don't. I believe that I bought one package of Piedmonts once, and didn't like them.

X-Q. 31. Do you know what Mecca cigarettes sell for?

A. I know that they were at one time put up in smaller packages and sold for less money; I just know of it, I never had a package in my hand.

X-Q. 32. Do you know what Helmar sells for?

A. The what?

X-Q. 33. Helmar.

A. Why, 20 or 25 cents, and ten in a box, isn't it?

X-Q. 34. What do the Egyptian Deities sell for?

A. The what?

X-Q. 35. The Egyptian Deities.

A. I don't know.

X-Q. 36. Do you know what Sweet Caporals sell for?

A. No.

X-Q. 37. So, then, as a matter of fact, in this question of comparison you made, you can't really say how the price of Beech-Nut cigarettes compares with the other cigarettes on the market?

A. I didn't ever say so.

X-Q. 38. I ask you; I ask you now.

A. I distinctly stated that I didn't compare it with everything in the market. I compared it with those that I considered a similar package.

X-Q. 39. Then you don't know that the cigarettes I mentioned, which you said you didn't know the price of, you don't know how those brands compare with the Beech-Nut cigarettes, do you?

A. I don't know how they compare with them enough to make a definite statement of price. I do have an impression in my mind as to where they would be classified with the other cigarettes.

X-Q. 40. You mean with the other cigarettes that you know of?

A. That you have mentioned.

X-Q. 41. How would you say that the quality, price and other factors of the Beech-Nut cigarette compares with the Sweet Caporal cigarette?

A. The smoking value or price value?

X-Q. 42. The price and quality.

A. I think I told you I didn't know the price of Sweet Caporal, didn't I?

X-Q. 43. Did you ever see the Beech-Nut scrap tobacco?

A. Never.

X-Q. 44. The Beech-Nut scrap tobacco put out by Lorillard?

A. I never saw it.

X-Q. 45. You never saw a package like that before?

(Mr. Cavanagh refers to Defendant's Cross-Exhibit No. 1.)

A. No, I never saw it.

Mr. Cavanagh: That is all.

Mr. Hinton: Deposition closed.

ALFRED W. GODFREY.

ARTHUR A. SKINNER, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you please state your name, residence and occupation?

A. Arthur A. Skinner; 38 years old; residence, Reading, Mass.; occupation, grain broker.

Q. 2. Do you trade on the floor of the Boston Chamber of Commerce, Mr. Skinner?

A. Yes.

Q. 3. I show you a package of cigarettes, which is in evidence in this case as Beech-Nut Exhibit No. 1. Have you ever seen these cigarettes before, and if so, when and where did you first see them?

A. Why, I first saw them, probably, Oh, somewhere in the spring. In fact, I bought a package downstairs.

Q. 4. When you first saw these cigarettes by whom did you believe they were made?

A. Why, I assumed that they were made by the Beech-Nut people, the gum people, the people that make candy and gum, and so forth.

Q. 5. You may state, if you will, what led you to that belief.

A. Why, because I had seen so much of the Beech-Nut gum, and if you knew the gum you would naturally think the Beech-Nut cigarettes were made by the same people.

Q. 6. Did you continue to believe that the Beech-Nut people put out these cigarettes after you bought them?

A. Why, yes; I never knew any different. I didn't know who made them, I assumed they were made by the same people, so far as I knew.

Q. 7. When were you first informed that these cigarettes were not a product of the Beech-Nut Packing Company?

A. Why, I never knew any different; in fact, I guess you were the first one that told me.

Q. 8. And when was that?

A. That was day before yesterday.

Mr. Hinton: That is all the direct examination.

*Cross-Examination.*

X-Q. 9. (By Mr. Cavanagh.) Do you smoke, Mr. Skinner?

A. Yes

X-Q. 10. Do you smoke Beech-Nut cigarettes?

A. Why, I have smoked them. I smoke the Lucky Strike mostly. I smoke anything, for that matter, pipe and cigars.

X-Q. 11. About how often have you smoked these Beech-Nut cigarettes?

A. Why, I don't think I ever bought but two packages. When they first came out a fellow had them on the floor, and I bought a package—in fact, two packages.

X-Q. 12. Did you ever hear of the P. Lorillard people?

A. The tobacco people, yes.

X-Q. 13. How long have you known those people?

A. Oh, I couldn't say off-hand. I have seen their ads, you know; I would not know, a number of years, possibly.

X-Q. 14. You know that they are well known tobacco manufacturers?

A. Why, I have seen their names times enough on things.

X-Q. 15. Mr. Skinner, if you went into a store and asked for a package of Beech-Nut chewing gum, would you be confused or deceived into taking a package of Beech-Nut cigarettes?

A. If I went for gum?

X-Q. 16. Yes.

A. I would expect to get gum.

X-Q. 17. You would not take Beech-Nut cigarettes, or any tobacco product in place of the gum?

A. No, sir.

X-Q. 18. When you purchased the package of Beech-Nut cigarettes like this Plaintiff's Exhibit No. 1, to which you have referred, did you examine the wrapper of it?

A. No, I took them out and smoked them.

X-Q. 19. Will you examine that and tell me what that name is on there?

A. P. Lorillard Co.

X-Q. 20. Well, that is not the name of the Beech-Nut Packing Company, is it?

A. No, sir.

X-Q. 21. Will you examine that package to see if you can find the name of the Beech-Nut Packing Company on it?

A. I do not find it.

X-Q. 22. So when you purchased those cigarettes, after you examined them, you would have seen that name, P. Lorillard Co. on it, would you not?

A. Oh, yes, if I examined them closely, but I didn't notice the cigarettes. I am not particularly interested in who makes them. I open them and smoke them. Of course, I don't know who makes the Fatimas, or the Camel, but I do know who makes Lucky Strike, because I smoke so many of them.

X-Q. 23. You never really take the trouble to examine them?

A. No.

Mr. Cavanagh: I think that is all.

Mr. Hinton: I have no redirect examination.

Deposition closed.

ARTHUR A. SKINNER.

JOHN J. KING, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. J. J. King; 707 Chamber of Commerce, Boston, Mass.; grain broker; age, about 27.

Q. 2. Do you trade on the floor of the Boston Chamber of Commerce, Mr. King?

A. Yes, sir.

Q. 3. I show you a package of cigarettes which is in evidence in this case as Beech-Nut Exhibit No. 1, and ask you whether or not you ever saw these cigarettes before, and, if so, when and where did you first see them?

A. I have seen them at the Chamber of Commerce cigar stand.

Q. 4. When was that?

A. Oh, it was some little time ago, I don't know just how long. To tell you frankly, I never paid much attention to them anyway.

Q. 5. When you first saw these cigarettes by whom did you believe that they were made?

A. I understood they were a Beech-Nut product. The only Beech-Nut product I knew was bacon, and so forth.

Q. 6. Will you tell us what you mean by a Beech-Nut product?

A. Why, something put out by the people who put out peanut butter, bacon, and so forth.

Q. 7. Please state, if you know, what it was that led you to that belief.

A. Why, I simply thought that. I only knew that there was only one Beech-Nut Company, and that was the people that put out the other stuff.

Q. 8. Did you ever smoke any of these cigarettes?

A. One or two.

Q. 9. When did you first find out, if you did find out, that these cigarettes were not the product of the Beech-Nut Packing Company?

Mr. Cavanagh: That is objected to.

Mr. Hinton: Question withdrawn.

Q. 10. Do you now believe that these cigarettes are the product of the Beech-Nut Packing Company?

A. No.



Mr. Cavanagh: Objected to as leading.

Q. 11. When did you first find that these cigarettes were not a product of the Beech-Nut Packing Company?

A. Upon talk with Colonel Skene, about two months ago.

Q. 12. Is Colonel referred to Robert Skene, Jr.?

A. Yes.

Q. 13. Did he give you this information before or after you had smoked these Beech-Nut cigarettes, do you remember?

A. I believe it was after.

Q. 14. Did you subsequently purchase any of these cigarettes?

A. No.

Mr. Hinton: That is all.

*Cross-Examination.*

X-Q. 15. (By Mr. Cavanagh.) Have you ever purchased any Beech-Nut cigarettes?

A. No, sir.

X-Q. 16. Never bought any?

A. Not of the Beech-Nut.

X-Q. 17. Did you ever carefully examine that package of Beech-Nut cigarettes, marked Plaintiff's Exhibit No. 1?

A. Why, never carefully, no. I have seen them at a distance, that is all.

X-Q. 18. You find the name, P. Lorillard Co. on that package, do you not?

A. Yes.

X-Q. 19. Did you ever hear of P. Lorillard Co.?

A. Yes.

X-Q. 20. They are big tobacco people, are they not?

A. I understand so.

X-Q. 21. Well, you know they are in the tobacco business?

A. Yes.

X-Q. 22. Do you find the name Beech-Nut Packing Company on that package?

A. No, sir; I don't see it anywhere.

X-Q. 23. So, if you had looked at this package you would have considered that it was put up by Lorillard Company, wouldn't you?

A. Yes, sir.

X-Q. 24. If you went into a store and asked for a package of Beech-Nut chewing gum, could you be deceived into taking a package of Beech-Nut cigarettes in place of the Beech-Nut chewing gum?

A. Probably not; unless I didn't examine the package closely.

X-Q. 25. Well, I mean if you wanted chewing gum, if you wanted to chew some gum at that time, and wanted a package of chewing gum, would you take a package of Beech-Nut cigarettes in place of it?

A. Oh, no.

Mr. Cavanagh: That is all.

*Redirect Examination.*

R-D. Q. 26. (By Mr. Hinton.) If you went to a store and wanted to buy Beech-Nut chewing gum, would you take Beech-Nut mints, or Beech-Nut ham, or Beech-Nut bacon in place of it?

A. I might take the mints, I don't think I would take the ham.

Mr. Hinton: Nothing further.

Deposition closed.

JOHN J. KING.

RICHARD E. POPE, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Richard E. Pope; 44; Marblehead, Mass.; grain merchant.

Q. 2. Where is your business, Mr. Pope?

A. In the Chamber of Commerce.

Q. 3. Do you trade on the floor of the Boston Chamber of Commerce?

A. Yes, constantly.

Q. 4. Mr. Pope, I show you a package of cigarettes, which is in evidence in this case as Beech-Nut Exhibit No. 1, and ask you if you have ever seen these cigarettes before, and if so, when and where did you first see them?

A. Well, I would not remember the exact date. I bought some here in the building, I remember, when they were first put on sale.

Q. 5. Could you tell me the approximate date?

A. Well, three or four months ago, I guess.

Q. 6. Was it in the spring or summer?

A. It was in the spring.

Q. 7. Would you be able to say it was early or late spring?

A. No, I could not.

Q. 8. When you first saw these cigarettes, Mr. Pope, by whom did you believe they were put out?

A. The people who put out Beech-Nut bacon—I don't know who they are.

Q. 9. Did you buy a package of these cigarettes with that belief?

A. I did, yes, naturally.

Q. 10. Do you now believe that the people who put out Beech-Nut bacon put out these cigarettes?

A. No, I know they don't.

Q. 11. When and how, if you remember, were you first informed that these people did not put out these cigarettes?

A. Why, in conversation with Mr. Skene, he told me that they did not make them, which was a surprise to me.

Q. 12. Is the Mr. Skene you have referred to, Mr. Robert Skene, Jr.?

A. Yes.

Q. 13. Who does business in this building, and on the floor?

A. Yes.

Q. 14. Mr. Pope, will you state, if you are able to, why you believed that this was a product of the same people who put out the bacon, if you remember?

A. Well, because of the extreme popularity of the Beech-Nut bacon, it was a likely brand to attract popular attention. Therefore I supposed they were using it with a cigarette, as they had with their other products. It was a perfectly natural conclusion, I should say, that was.

Q. 15. Are you familiar at all with the label or dress of Beech-Nut products, such as the bacon, and other products?

A. I don't know that I am; no, I am not. I don't carry them about in my pocket as I would cigarettes, naturally. Well, I do know them in a way. If I saw Beech-Nut bacon in a shop, I would recognize it without reading the label.

Q. 16. Are you familiar with the general appearance of the Beech-Nut label; I don't mean the technical details of the label, but the general appearance of the label, sufficiently so you would recognize it if you saw it?

A. I could not describe it.

Mr. Hinton: That is all.

—in fact, I was rather friendly with him, he used to come out to the house to spend the evening, and I most always took lunch with him two or three times during the week he was here, and he sent me down a case of Beech-Nut products, and, of course, I naturally was interested in the Beech-Nut products, more so than others would be on account of knowing him as well as I did.

Q. 7. You stated that when you first saw these cigarettes you believed that they were put out by the Beech-Nut Packing Company?

A. I believed they were sold by them, yes.

Q. 8. Yes. Did you receive that impression from looking at the cigarettes?

A. No, I received the impression from the brand entirely. I didn't look at the package to see who made it; in fact, I didn't know for quite a while.

Q. 9. Do you now believe that these cigarettes are put out by the Beech-Nut Packing Company?

A. No, I don't believe they are now, because I have been told they were not.

Q. 10. Do you remember who it was that told you they were not?

A. Why, no; I don't know whether I found out by looking at the package, or through Colonel Skene. I had more or less jollyng with him about them—about everyone did who knew him—and I can't say exactly when I knew.

Q. 11. Is this Mr. Skene you refer to Mr. Robert Skene, Jr., who does business in this building?

A. Yes, he is.

Q. 12. What kind of jollyng was this that you refer to?

A. Why, we merely mentioned the fact that they had gone into the tobacco business, and they were not making a very good cigarette, something like that. Perhaps it started in a jolly, with some truth to it.

Q. 13. If I understand you, you are not able to state now whether Mr. Skene advised you or not?

A. Oh, he has advised me, but whether he advised me first, I couldn't say; I don't remember.

Mr. Hinton: That is all.

*Cross-Examination.*

X-Q. 14. (By Mr. Cavanagh.) Do you know the P. Lorillard Company?

A. Yes.

X-Q. 15. What kind of business are they in?

A. In the tobacco business, manufacturers of both smoking tobacco and chewing tobacco and cigarettes.

X-Q. 16. You have known that concern for years, haven't you?

A. Yes.

X-Q. 17. Whose name appears on that package, Plaintiff's Exhibit 1?

A. Lorillard's name appears on it.

X-Q. 18. That would indicate to you that that was their package?

A. Yes.

X-Q. 19. Did you ever know the Beech-Nut Packing Company to put out any tobacco product?

A. No, sir.

X-Q. 20. You never heard of their doing so?

A. No, sir.

X-Q. 21. If you went into a store and wanted a package of chewing gum, to chew at that time, could you be deceived into taking a package of Beech-Nut cigarettes, if you asked for chewing gum?

A. Not if I asked for chewing gum, no.

Mr. Cavanagh: That is all.

Recess until 2:30 P. M.

Deposition closed.

JOHN F. LAPHAM.

## Afternoon session.

THOMAS F. MALONEY, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Thomas F. Maloney; 61 White street, Roxbury, Mass.; salesman.

Q. 2. Your age.

A. 28.

Q. 3. Where do you do business?

A. Chamber of Commerce.

Q. 4. Chamber of Commerce Building, Boston, Massachusetts?

A. Yes.

Q. 5. I show you a package of cigarettes, which is in evidence in this case as Beech-Nut Exhibit No. 1. Have you seen these cigarettes before, and if so, will you please state when and where you first saw them?

A. Why, I saw the cigarettes in the hands of another fellow at one time, and the next time I bought cigarettes I bought them myself. I don't know exactly at what store.

Q. 6. When you saw and bought these cigarettes, by whom did you believe they were put up?

A. Why, not having any interest in it, I naturally associated the name of Beech-Nut with the ham products, and so forth.

Q. 7. Did you continue to believe this after you had bought and smoked the cigarettes?

A. Surely; I didn't give it any thought.

Q. 8. Do you now believe that these cigarettes are put up by the same people who put out the gum?

A. No, I know differently than that.

Q. 9. Will you state how and when you first learned that these cigarettes were not put out by the people who put out the gum?

A. The first I knew of it was when you came around the other day and told me about it. I don't know what that day was, Thursday or Friday—Thursday, I think it was.

Mr. Hinton: I think that is all.

*Cross-Examination.*

X-Q. 10. (By Mr. Cavanagh.) Where did you buy these Beech-Nut cigarettes, marked Plaintiff's Exhibit No. 1?

A. At a smoke store; I think it was on State street, I am not sure. It might have been down on the counter here in this building.

X-Q. 11. Did you examine the package to see if the Beech-Nut Packing Company's name appeared on it?

A. No, sir.

X-Q. 12. Then you didn't deliberately buy this as a product of the Beech-Nut Packing Company?

A. I did not, no.

X-Q. 13. Will you tell me whose name does appear on that?

A. P. Lorillard Co. I never heard of them before I saw it there—P. Lorillard Co., no.

X-Q. 14. If you went into a store, Mr. Maloney, and asked for a package of Beech-Nut chewing gum, would you be deceived or confused into taking a package of cigarettes for a package of chewing gum?

A. Sure.

X-Q. 15. By what?

A. Deceived? I would not be deceived, surely not.

X-Q. 16. You would know the difference between tobacco and chewing gum?



A. Surely, yes.

X-Q. 17. And between cigarettes and chewing gum?

A. Sure I would.

Mr. Cavanagh: I think that is all.

Mr. Hinton: That is all.

Deposition closed.

THOMAS F. MALONEY.

It is stipulated by and between the parties hereto, through their respective counsel, that if Mr. GEORGE CATLIN were called he would testify as follows:

My name is George Catlin, and I am a member of the firm of Catlin & Company, brokers. I trade on the floor of the Boston Chamber of Commerce. I first saw Beech-Nut cigarettes, similar to Beech-Nut Exhibit No. 1, on the cigar stand in the Chamber of Commerce Building, Boston, early in the spring of 1921; when I first saw these cigarettes I believed that they were made by the Beech-Nut people, the same people that make the other Beech-Nut products, like the ham, chewing gum, and so forth. I never bought a package of these cigarettes, but have smoked them when my friends had them. I continued to believe that these cigarettes were made by the Beech-Nut people until I was told, on August 12, 1921, by Mr. Hinton, that they were not a product of the Beech-Nut Packing Company. My reason for believing that these cigarettes were the product of the Beech-Nut Packing Company was the name "Beech-Nut," and the appearance of the package.

On cross-examination it is agreed that he would testify as follows:

As above stated, I have never purchased any of these cigarettes, but have smoked some given to me by my friends. I did not examine the package, and therefore I

didn't know that the name, "P. Lorillard Co." appeared thereon, as I now see by examining this package, Plaintiff's Exhibit No. 1. If I went into a store and asked the salesman for a package of Beech-Nut chewing gum, a product of the Beech-Nut Packing Company, I would not be confused or deceived into accepting a package of cigarettes like this Plaintiff's Exhibit No. 1, in the place and stead of a package of chewing gum.

W. G. TORREY, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you state your name, age, residence and occupation?

A. W. G. Torrey; 509 Chamber of Commerce Building; residence, 56 Crescent avenue, Revere, Massachusetts; occupation, miller representative; age, 49.

Q. 2. Is the Chamber of Commerce you refer to the Chamber of Commerce in Boston, Massachusetts?

A. Yes.

Q. 3. Do you trade on the floor of the Boston Chamber of Commerce?

A. Yes, sir.

Q. 4. I show you a package of Beech-Nut cigarettes, which is in evidence in this case as Beech-Nut No. 1. Have you ever seen this cigarette before? If so, when and where did you first see them?

A. Why, I think I first saw them probably at the cigar stand on the street floor of the Chamber of Commerce.

Q. 5. When was that?

A. That I cannot say, some time last year, as I remember.

Q. 6. Do you mean during the year 1920?

A. I should say during the year 1920; it might have been before that—just as soon as they came out, I know, and were for sale, I saw them.

Q. 7. When you first saw these cigarettes, by whom did you believe that they were put out?

A. The Beech-Nut Packing Company, Arkell & Smiths Company—we say Arkell & Smiths, because they are familiar to us, thinking they are the same concern that handle the Beech-Nut lines.

Q. 8. You have referred to the Beech-Nut products. Will you give an illustration of what you mean by Beech-Nut products?

A. Why, we have a number of them that we use at home; I guess Beech-Nut bacon is one, and—I can't say right off-hand what they are; we have different things; I think they are jellies and jams, and things of that sort, if they make them.

Q. 9. Will you state, if you can remember, and if you know, why you believed that these cigarettes were a product of the Beech-Nut Packing Company when you saw them?

A. They are the only people that I ever connected the name with.

Q. 10. Have you a general familiarity with the label which has appeared on various products of the Beech-Nut Packing Company?

A. Yes.

Q. 11. Did the dress of this package of cigarettes, by dress, it's general appearance, have anything to do with your believing that it was a product of the Beech-Nut Packing Company?

A. The name was the first thing that led me to think it was theirs, because I never connected the name with any other concern than the Beech-Nut people in Canajoharie. I have traveled through there many times and have seen their sign, and knew the members of the concern.

Q. 12. The last question is repeated.

A. Yes.

Q. 13. Will you explain what you mean?

A. Well, the brand on the cigarettes led me to believe that it was one of the products of the Beech-Nut Packing Company.

Q. 14. Will you tell me, please, Mr. Torrey, whether you now believe that these cigarettes are a product of the Beech-Nut Packing Company?

A. No, I do not.

Q. 15. Will you state, if you can remember, when and how you first found out that these cigarettes were not a product of the Beech-Nut Packing Company?

A. Why, I think after buying packages of them I discovered some tobacco company's name on the package, and, as I recall, I spoke of the matter to Mr. Skene, who represents Arkell & Smiths here, who are the same people as the Beech-Nut people, I spoke to him about it—I don't know that he knew it at the time until we talked the matter over, that there was such a cigarette on the market, and then I learned it had nothing to do with the Beech-Nut Company.

Q. 16. Did Mr. Skene tell you this, do you remember?

A. In conversation with him, I think he told me that they didn't.

Mr. Hinton: That is all.

*Cross-Examination.*

X-Q. 17. (By Mr. Cavanagh.) You say you have got packages of these cigarettes?

A. When they were first on sale here.

X-Q. 18. When you examined the package, what name did you find on it?

A. P. Lorillard Company.

Mr. Hinton: Witness examines package before answering the question.

X-Q. 19. What did that indicate to you?

A. That P. Lorillard were the manufacturers.

X-Q. 20. You don't find the name Beech-Nut Packing Company on that package, do you?

A. No.

X-Q. 21. If you went into a store and asked for a package of Beech-Nut Packing Company's chewing gum, would you be confused or deceived into taking a package of these Lorillard cigarettes for the chewing gum?

A. No.

X-Q. 22. You consider them an entirely different article?

A. Why, I would not accept these cigarettes for chewing gum, if that is what you mean.

X-Q. 23. Yes, that is what I mean.

A. No.

X-Q. 24. Before you saw these cigarettes you never knew that the Beech-Nut Packing Company put out any tobacco product, did you?

A. No.

Mr. Cavanagh: That is all.

*Redirect Examination.*

R-D. Q. 25. (By Mr. Hinton.) Do you smoke Camel cigarettes?

A. Occasionally.

R-D. Q. 26. Can you tell me what is written on the package of Camel cigarettes, underneath the picture of the camel?

A. No.

R-D. Q. 27. Have you smoked the Fatima cigarette?

A. Yes; smoking one now.

R-D. Q. 28. Can you tell me what is written on the bottom of the package of Fatima cigarettes?

A. Nothing but the name "Fatima," I think, and the appearance of the package.

R-D. Q. 29. Mr. Torrey, I show you a package of Camel cigarettes, on which appears in bold-faced type, certain printing underneath the picture of the camel. Will you tell me which appears the most conspicuous to you, that bold-faced printing, or the name "P. Lorillard Co.," and on Beech-Nut Exhibit No. 1, as that name shows through the wax paper wrapper?

A. Will you repeat that question?

R-D. Q. 30. The last question is repeated.

A. The printing on the package of Camels. The reason I asked to have it repeated, I thought you asked me about the name of the makers of it.

R-D. Q. 31. Now, will you examine a package of Fatima cigarettes, which you have just pulled out of your pocket; do you find the name of the manufacturer at the bottom of this cigarette package?

A. Yes.

Mr. Hinton: That is all.

*Recross-Examination.*

R-X Q. 32. (By Mr. Cavanagh.) Comparing this package of Beech-Nut cigarettes, Plaintiff's Exhibit 1, with the glase wrapper removed, doesn't the words "P. Lorillard Co." appear to you just plainly on that package as the printing on the Camel package of cigarettes?

A. No.

R-X Q. 33. Then, in your opinion, the contrast of black on red is as distinct as brown upon yellow; is that right?

A. The printing at the bottom on the package of Camel cigarettes is much clearer, to me, than the printing on the bottom of the package of Beech-Nut cigarettes.

R-X Q. 34. But you have no trouble in reading that name, "P. Lorillard Co.," on there, have you?

A. No.

Deposition closed.

W. G. TORREY.

It is stipulated by and between the parties hereto, as follows:

That if Mr. W. J. BUCKLEY were called that he would testify as follows:

I am of lawful age, and am employed by the Southworth Company, brokers, who have offices here in the Chamber of Commerce Building, Boston, Massachusetts.

I first saw cigarettes similar to Beech-Nut Exhibit No. 1 on the cigar stand in the Chamber of Commerce Building, Boston, Massachusetts; subsequently I remember that my friend, Thomas Maloney, who is employed in the same building, bought a package of these cigarettes and he had them on the table at lunch. I smoked some of the cigarettes. When I first saw the Beech-Nut cigarette, and when I smoked them, I believed that they were a product of the Beech-Nut Packing Company, the same people who make the ham, bacon, chewing gum, and other products. I continued to believe that these cigarettes were the product of the Beech-Nut Packing Company until Mr. Hinton told me, on August 12, 1921, that they were not.

And on cross-examination it is agreed that the witness will testify as follows:

That I had no discussion with Mr. Maloney or anyone else as to whether or not these Beech-Nut cigarettes, like Plaintiff's Exhibit No. 1, were put out by the Beech-Nut Packing Company or not; I did not pay any particular attention to the package, but now that it is called to my

attention, I see that the words P. Lorillard Co. appear upon this Beech-Nut package of cigarettes (Plaintiff's Exhibit No. 1), and I do not find anywhere on the package the name of the Beech-Nut Packing Company. I have not myself purchased any of these Beech-Nut cigarettes.

If I went into a store and asked for a package of Beech-Nut chewing gum, the product of the Beech-Nut Packing Company, I would not be confused or deceived into taking a package of Beech-Nut cigarettes, taking it for or accepting it in the place and stead of a package of Beech-Nut chewing gum.

MARGARET M. HUNT, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, residence and occupation.

A. Margaret M. Hunt, 662 Columbia Road, Dorchester, Massachusetts.

Q. 2. And you are of legal age?

A. Yes.

Q. 3. What is your occupation?

A. Clerk here at the cigar stand.

Q. 4. This cigar stand is in the Chamber of Commerce Building, Boston, Massachusetts?

A. Yes.

Q. 5. Do you sell over the counter here cigarettes similar to Beech-Nut Exhibit 1, which I now show you, and if so, how long have you sold them?

A. Yes; I could not really state how long we have had these cigarettes. Did you say they came out in April?



Q. 6. Would it be the spring or summer of 1921, or what?

A. You better make it in April. I don't think we have had them any longer than that time.

Q. 7. When you first sold these cigarettes, by whom did you believe they were made?

A. Why, I thought the Beech-Nut people put them out.

Q. 8. When and how did you first find out, if you found out, that the Beech-Nut people did not put them out?

A. I asked Mr. Steare about them, and he said, "No, they don't put them out." That is all.

Q. 9. When you first sold these cigarettes over the counter here, did you hear any remarks or inquiries from people over the counter, if you can recall?

A. No, I just passed them out, that is all.

Mr. Hinton: That is all.

*Cross-Examination.*

X-Q. 10. (By Mr. Cavanagh.) Do you have anything to do with the purchasing of the goods here?

A. No, Mr. Schroder does that. I don't do the buying at all. Mr. Schroder does all the buying.

X-Q. 11. Will you tell me what name is on that package of cigarettes (showing witness package of cigarettes)?

A. What name is on there?

X-Q. 12. Yes.

A. "P. Lorillard Co.," not and company, just "P. Lorillard Co."

X-Q. 13. You never took P. Lorillard Co.'s cigarettes for any product of the Beech-Nut Company, did you?

A. No.

X-Q. 14. If a person came and asked you for a pack-

age of Beech-Nut chewing gum, would you try to sell him a package of Lorillard cigarettes?

A. We don't do that at all; we give them what they ask for.

Mr. Cavanagh: That is all.

*Redirect Examination.*

R-D. Q. 15. (By Mr. Hinton.) When you were questioned by Mr. Cavanagh when you were handed this package of Beech-Nut cigarettes, did you make out the name yourself, or did you ask somebody else here to help you read it?

A. I just asked Mr. Schroder, and he said it was "P. Lorillard Co."

*Recross-Examination.*

R-X Q. 16. (By Mr. Cavanagh.) When you spoke about the date when you first got these cigarettes here, you asked Mr. Hinton what the date was?

A. Yes, because I didn't buy them, you know. I don't do any of the buying here at all, and I can't recall just when we got them in here.

Mr. Hinton: The record shows that I certainly did not tell the witness anything during the examination.

Mr. Cavanagh: That is all.

Deposition closed.

MARGARET M. HUNT.

Further taking of depositions adjourned to Wednesday, August 17, 1921, at 10 o'clock A. M.

BOSTON, MASS., 10 A. M., Wednesday, Aug. 17, 1921.

Met pursuant to adjournment.

LEO LEWIS, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. What is your name?

A. Leo Lewis.

Q. 2. Please state your name, residence and occupation.

A. Leo Lewis; home address, 9 Dewey street, Roxbury, Mass.; business address, 42 Huntington avenue, Boston; occupation, cigar clerk.

Q. 3. That is, Huntington avenue, Boston, Mass.?

A. That is Boston, yes.

Q. 4. And what kind of a store are you a clerk in?

A. Cigar store.

Q. 5. That is located at the Huntington address that you just gave?

A. 42 Huntington avenue.

Q. 6. I show you a package of cigarettes, which is in evidence in this case as Beech-Nut Exhibit No. 1. State whether or not you are selling these cigarettes over the counter, and if so, how long you have sold them.

A. Why, I have been selling Beech-Nut cigarettes ever since they have been on the market, that is, some time in March or April. I don't know just when they came out, but ever since they have been on the market.

Q. 7. That is, March or April, 1921?

A. 1921; yes, sir.

Q. 8. Will you state when you first saw these cigarettes and first sold them over the counter, by whom you believed they were made?

A. Why, I believed they were made by the Beech-Nut Products.

Q. 9. That is, the Beech-Nut Packing Company?

A. Yes.

Mr. Cavanagh: I object; it is leading.

Q. 10. How long did you continue to believe this, and how were you first advised differently, if at all?

A. Why, about the first or second day—it was either the first or second day that I was selling them, the salesman from the Lorillard Company came in; of course, I knew him well, the salesman, and he had the cigarettes, and of course he gave me a package of cigarettes. Of course that is when I knew they were Lorillard cigarettes, either the first or second day, the second day, I think—we had just got them in, and he came the next day.

Q. 11. Had you sold these over the counter before this salesman came in?

A. Yes, I had.

Q. 12. Had you in the first of your selling these cigarettes over the counter heard comments or remarks from the public over the counter about these cigarettes; if so, will you please state what those remarks or comments were?

A. Why, yes; when they first came out, at the start, they asked me if the cigarette was as good as the gum. In other words, if the cigarettes were as good as the gum, they were pretty good.

Q. 13. How frequently did you hear remarks of that character?

A. Oh, why, pretty near every day; that is, for about two or three weeks, that is, when the cigarette was new, when I was pushing the cigarette.

Q. 14. Well, what I want to get at, Mr. Lewis, is

whether you heard a good many of these remarks, or a few, or what?

A. Yes, I have heard a good many of these remarks.

Q. 15. Did people ever come into your store and say, "Give me a package of Beech-Nut"?

A. Yes.

Q. 16. And what did you do then?

A. Why, I often asked them if they wanted the gum or the cigarettes. As the cigarette was new, I didn't know what they wanted.

Mr. Hinton: Direct examination closed.

*Cross-Examination.*

X-Q. 17. (By Mr. Cavanagh.) How long have you been in the cigar store business—the tobacco business?

A. A year ago last June.

X-Q. 18. Are you in business for yourself, or do you work for somebody else?

A. Somebody else.

X-Q. 19. What is the name of the concern?

A. Schryder Segar Company.

X-Q. 20. Where is that store located?

A. 42 Huntington avenue, Boston.

X-Q. 21. How many men are employed in that store?

A. Two; that is, myself and another man—oh, by the company, do you mean?

X-Q. 22. No, where you work.

A. Two men, myself and another one.

X-Q. 23. How large is that store there, a large store?

A. Why, it is about as large as this room here, I should think.

X-Q. 24. Is it a corner store?

A. No.

X-Q. 25. In the middle of the block?

A. Well, yes, in the middle of the block, yes; where the Hotel Oxford is.

X-Q. 26. Is it a residential neighborhood or business section?

A. Why, it is residential and business.

X-Q. 27. It is not like the center of Boston?

A. No.

X-Q. 28. It is more of a residential neighborhood?

A. It is more of a residential neighborhood.

X-Q. 29. You say you have been in business over a year?

A. Yes.

X-Q. 30. I presume you have made some study of the various concerns in the tobacco business?

A. Some of them, yes.

X-Q. 31. Would you name some of the larger tobacco manufacturers?

A. Why, the American Tobacco Company is about the largest, I think.

X-Q. 32. What other concerns?

A. Schenasi Brothers; and there is J. P. Lorillard, if I am not mistaken.

X-Q. 33. What other concerns? Did you ever hear of Liggett & Myers?

A. Yes.

X-Q. 34. Did you ever hear of R. J. Reynolds & Company?

A. Yes.

X-Q. 35. What cigarette does Reynolds put out?

A. Camels.

X-Q. 36. What cigarette does Liggett & Myers put out?

A. They put out Condax cigarettes.

X-Q. 37. What others?

A. I think they put out Fatimas and Chesterfields.

X-Q. 38. What cigarette does American Tobacco Company manufacture?

A. He puts out "111." He puts out the Pall Mall.

X-Q. 39. What cigarette does the Lorillard Company put out?

A. Beech-Nut.

X-Q. 40. What else?

A. Murads.

X-Q. 41. What else?

A. I don't know; I am not sure whether they make the Helmars or not.

X-Q. 42. I show you a package of Beech-Nut cigarettes in this case as Plaintiff's Exhibit No. 1. Would you tell me what name that has on there?

A. P. Lorillard Co.

X-Q. 43. Is that the J. P. Lorillard Company you meant when you named one of the big tobacco manufacturers?

A. Yes.

X-Q. 44. When this cigarette first came to your attention, or reached your store, did you notice the name on it?

A. No, sir.

X-Q. 45. You didn't take the trouble to examine the package?

A. No, I don't think I did.

X-Q. 46. If you had examined that package, would you have known it was not made by the Beech-Nut Packing Company?

A. If I had examined it, yes.

X-Q. 47. You don't find the Beech-Nut Packing Company's name on it, do you?

A. No, I don't find it on it.

X-Q. 48. But you do find "P. Lorillard Co." on there?

A. Yes.

X-Q. 49. And that indicates to you that it is a product of P. Lorillard Company, doesn't it?

A. Yes.

X-Q. 50. Did you ever sell anybody Beech-Nut chewing gum, made by the Beech-Nut Packing Company, for and in the stead, or in the place of the Beech-Nut cigarette made by P. Lorillard Company?

A. No; I never sold chewing gum in the place of cigarettes.

X-Q. 51. If a man came into your place and asked you for a package of Beech-Nut chewing gum, made by the Beech-Nut Packing Company, you would not try to sell him a package of Lorillard's cigarettes?

A. No, certainly not.

X-Q. 52. Do you think a man would be crazy to do that?

A. Why, a man would be crazy, who was in the tobacco business.

X-Q. 53. I hand you a package which is in this case, a package of scrap tobacco which is in this case as Defendant's Cross-Exhibit No. 1. Do you recognize that package?

A. Yes.

X-Q. 54. Have you sold that tobacco?

A. I do.

X-Q. 55. Is that a good seller?

A. It is.

X-Q. 56. Whose tobacco is that; who makes it?

A. Why, on the package it says, "P. Lorillard Co."

X-Q. 57. How do you know, by the name of the package?

A. Yes.

X-Q. 58. You have sold that since you have been in the business?



A. Yes.

X-Q. 59. You would not think that the Beech-Nut Packing Company made that tobacco, would you?

A. No.

X-Q. 60. I show you a carton, or a package, and ask you if you recognize that.

A. I do.

X-Q. 61. Will you tell me what that is?

A. That is made by Lorillard; is that what you mean?

X-Q. 62. Yes.

Mr. Cavanagh: The package submitted to the witness, which is a sealed carton, "Lorillard Beech-Nut Perfect Cigarettes," is offered in evidence, and is marked Defendant's Cross-Exhibit No. 4.

X-Q. 63. You would not take that package to be any of the Beech-Nut Packing Company's product, would you?

A. I would not take it to be after I knew, but, as I said before, I didn't know what they were.

X-Q. 64. I mean that package now.

A. Oh, now, no.

X-Q. 65. And you saw that name Lorillard on it?

A. Yes.

X-Q. 66. Did you ever have any customer come into your store and say, "I want a package of Beech-Nut cigarettes made by the Beech-Nut Packing Company"?

A. No, I don't recall it just in that way.

X-Q. 67. And if any customer did ask you that question, you would not try to sell him Lorillard's cigarettes, if he wanted a cigarette of the Beech-Nut Packing Company?

A. Why, no. I would tell him who they were made by, if they did.

X-Q. 68. Yes. The Lorillard salesman that calls at your store, who is he?

A. I can't recall his name.

X-Q. 69. Can you describe him?

A. Yes; I only knew that he was head fellow from out of town; he don't belong here at all. I think he came from New York; he is a big, heavy, stout fellow—big, stout fellow.

X-Q. 70. You don't recall his name?

A. He is the head—I believe he is the head of the whole organization. I believe he is from New York.

X-Q. 71. You have never made an attempt to sell Lorillard's products in the place of Beech-Nut Packing Company products, have you?

A. Never.

Mr. Cavanagh: I think that is all.

*Redirect Examination.*

R-D. Q. 72. (By Mr. Hinton.) Do you remember, Mr. Lewis, when you first observed the name Lorillard on Beech-Nut scrap tobacco which was shown you this morning by Mr. Cavanagh in cross-examination?

A. Do I remember? Just what do you mean, the name?

R-D. Q. 73. Do you remember when you first noticed the name Lorillard on Beech-Nut scrap tobacco?

A. I just noticed it this morning, today.

R-D. Q. 74. Just when Mr. Cavanagh showed you this package?

A. Yes, sir.

Mr. Hinton: That is all.

*Recross-Examination.*

R-X Q. 75. (Mr. Cavanagh.) You never sold that package believing you were selling the Beech-Nut Packing Company's product, did you?

A. Why, I didn't give it a thought, that way; I never have. I never took particular notice.

R-X Q. 76. You sold it as a tobacco product, did you?

A. Yes.

R-X Q. 77. And you had the big cartons in the store filled with these small packages, did you?

A. Yes, sir.

R-X Q. 78. And they have printing all over them?

A. We don't get the big cartons up there. You see the store I work in buys through wholesalers, jobbers. In other words, when we order for our store we get small packages.

R-X Q. 79. Packages of this size?

A. No; there are two dozen, I think in a little square carton.

R-X Q. 80. Who do you buy your tobacco from?

A. From Berrenger-Hanauer Company.

R-X Q. 81. So you don't buy direct from the manufacturer?

A. No, sir.

R-X Q. 82. You simply get it from a jobber, a wholesaler?

A. Yes, sir.

R-X Q. 83. If you took the trouble to look at that package you would know it was a Lorillard product, wouldn't you?

A. If I had, yes.

Mr. Cavanagh: That is all.

Mr. Hinton: I haven't any more. That is all, Mr. Lewis.

Deposition closed.

Signature waived.

R. W. BLANCHARD, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. R. W. Blanchard; age, 30; residence, 1 Valley Road, Swampscott, Massachusetts; salesman.

Q. 2. For whom are you employed, Mr. Blanchard?

A. The Beech-Nut Packing Company.

Q. 3. How long have you been employed by the Beech-Nut Packing Company, and what did you do before that?

A. I have been employed by the Beech-Nut Packing Company since February, 1, 1921. Previous to that I sold tobacco and cigars.

Q. 4. What territory do you cover for the Beech-Nut Packing Company?

A. Essex County, Massachusetts.

Q. 5. What towns does that include, big towns?

A. That includes Lynn, Salem, Beverly, Peabody, Lawrence, Haverhill and Gloucester.

Q. 6. I show you a package of cigarettes which are in evidence in this case as Beech-Nut Exhibit No. 1. Have you seen these cigarettes before?

A. I have.

Q. 7. When you first saw these cigarettes, by whom did you believe that they were put out?

A. The Beech-Nut Packing Company.

Q. 8. State, if you remember, what you did when you first saw the cigarettes.

A. I inquired, and I found out that they were made by P. Lorillard Co.

Q. 9. Why did you make these inquiries?

A. Because I was having so many questions asked me as to whether they were made by my concern or not, and I wanted to find out for my own information.

Q. 10. When these cigarettes first came out in this territory, did you hear any comments or remarks, or inquiries, or the like, in the course of your work for the Beech-Nut Packing Company about these cigarettes? If so, will you please state what they were?

A. I had innumerable inquiries as to the cigarette. Dozens asked me when we came out with a cigarette; others asked what we were coming out with next, and a lot of people have said to me, "If your cigarette is as good as your chewing gum, it ought to be a good seller."

Q. 11. Will you give me an instance of remarks that you have heard by people about the Beech-Nut cigarettes?

A. Well, I can state an incident that happened in Lawrence, Mass.

Q. 12. How long ago?

A. About six weeks ago.

Q. 13. Please state the incident.

A. I entered a grocery store in Lawrence, Mass., and shortly after my entering the store a gentleman came in and inquired if they had marmalade. The clerk reached up on the shelf and took down a jar of Beech-Nut orange marmalade. He turned to me—I was standing near the—

Q. 14. Did the clerk say anything to the gentleman that you heard?

A. He told him—

Mr. Cavanagh: That I object to as calling for hearsay and not the best evidence.

Mr. Hinton: We are trying to get at the conversation and not trying to prove the truth or falsity of what the clerk said.

Q. 15. Proceed.

A. The clerk made a remark such as this: He said, "Here is the Beech-Nut man now." The gentleman turned to me, and he said, "If your marmalade is not any better than your cigarettes, I don't want it." I turned to the gentleman, and I told him that we had absolutely nothing to do with the cigarette. After I made that remark to him he purchased the marmalade and paid for it and went on his way.

Q. 16. Did you make any effort to get the name of the customer?

A. I did not.

Q. 17. Can you give the name of the clerk who was trying to sell this marmalade?

A. Mr. John J. Creevan, 34 Amesbury Street, Lawrence, Mass.

Q. 18. Well, give me some more inquiries, remarks, and so on, that you heard, if you can.

A. I entered a store in West Lynn, Mass., owned by Mr. C. A. Wilkins, and we got into conversation over the cigarette, and he informed me that P. Lorillard Co. controlled the Beech-Nut Packing Company. In fact he convinced me to believe it myself.

Q. 19. Did you have any more of these incidents that you can recall definitely?

A. Last Thursday morning, August 11th, I entered the same store of Mr. Wilkins, in West Lynn, Mass., and Mrs. Wilkins says, "You are the Beech-Nut man. Can you tell me something: Are the Beech-Nut cigarettes put out by the Beech-Nut Packing Company? I have had innumerable inquiries as to whether they were, and I would like to know so as to tell my trade, when they ask me."

Q. 20. All right. Give me any others.

A. On the afternoon of the same day, August 11, Mr.

Dennis Callahan, who is connected with a Salem whole-sale jobbing house, asked me if the Beech-Nut Packing Company made the Beech-Nut cigarette.

Q. 21. Are you sure that that is what Mr. Callahan asked you exactly? I want you to state these things as accurately as possible.

A. I think he asked me if the P. Lorillard Co. didn't own the Beech-Nut Packing Company.

Q. 22. You have testified that you have been a tobacco salesman until recently in this territory?

A. Yes, sir.

Q. 23. Can you tell me whether there is much of a market through this country for scrap chewing tobacco?

A. To tell you the truth, I never have seen scrap tobacco until last Thursday, and I saw it in two stores—just two.

Q. 24. I am talking about the market for scrap tobacco as compared with plug chewing tobacco.

A. There is very little market for it in Essex County.

Mr. Hinton: That is all. You may cross-examine.

*Cross-Examination.*

X-Q. 25. (By Mr. Cavanagh.) Mr. Blanchard, how long were you in the tobacco business?

A. A little over a year.

X-Q. 26. At what period?

A. Oh, 1920.

X-Q. 27. Just give me when you started and when you left the business.

A. Why, I started along in July, 1919, and I worked at it until about the middle of August, 1920.

X-Q. 28. What concern were you with?

A. Rosenthal Brothers & Bendetson.

X-Q. 29. Where are they located?

A. 121 North street, Boston.

X-Q. 30. What was the nature of their business?

A. They are wholesale tobacco jobbers.

X-Q. 31. And you sold tobacco in Boston for them?

A. I sold cigars in Essex County and part of Middlesex County.

X-Q. 32. On the road throughout that territory?

A. Yes.

X-Q. 33. Did you sell chewing tobacco?

A. No, sir; nothing but cigars.

X-Q. 34. Didn't sell cigarettes?

A. Very, very seldom. I had two or three concerns in Salem, and I handled them myself, but my regular line was to sell cigars.

X-Q. 35. Did you ever make any particular study of the tobacco business; that is, do you know how the different brands and blends are made and brought out?

A. I don't know as I do, particularly.

X-Q. 36. About how many customers or stores were embraced in your territory when you were working for this concern—just approximately?

A. Oh, approximately? The customers I had?

X-Q. 37. Yes.

A. Hundreds of them. I could not state just exactly.

X-Q. 38. Well, approximately.

A. It was about a five weeks' trip going around the circuit, so you see I called on hundreds of customers.

X-Q. 39. Retail stores?

A. Retail stores, yes.

X-Q. 40. Did you ever hear of the "Polar Bear" scrap tobacco?

A. No, sir.

X-Q. 41. Did you ever hear of "Honest" scrap?

A. No, sir.



X-Q. 42. Did you ever see that package in your trips around? I call your attention to Lorillard's Beech-Nut scrap tobacco, in this case as Defendant's Cross-Exhibit No. 1.

A. Not until last Thursday had I ever seen a package of Beech-Nut scrap tobacco.

X-Q. 43. You don't chew tobacco, do you?

A. No, sir.

X-Q. 44. Did you ever see any of the Beech-Nut Packing products with those red radiating lines on it, like that—these red lines here?

A. No, sir.

X-Q. 45. At what store was it that you have stated the customer made some remark about the marmalade—is that what it was?

A. Lawrence, yes.

X-Q. 46. And went on and said if it was not any better than the Beech-Nut cigarette, he didn't want it—where was that?

A. 34 Amesbury street, Lawrence, Mass.

X-Q. 47. What is the party's name?

A. James J. Creevan.

X-Q. 48. You say you don't recall the name of that customer?

A. I do not.

X-Q. 49. I notice that you are smoking a cigar now. You smoke, don't you?

A. Yes, cigars entirely.

X-Q. 50. Did you ever smoke a cigarette?

A. Some.

X-Q. 51. You know different people have different tastes and different favorites in cigars and cigarettes, do you not?

A. Yes.

X-Q. 52. One man may praise one brand a lot and another man may say this is no good?

A. Yes.

X-Q. 53. It is all a matter of individual taste, isn't it?

A. Yes, sir.

X-Q. 54. And that package of Beech-Nut cigarettes, which is in this case as Plaintiff's Exhibit No. 1, which Mr. Hinton showed you, you noticed that name on there, didn't you?

A. I do now.

X-Q. 55. What is that name?

A. P. Lorillard Co.

X-Q. 56. You know the Lorillard Company is a large tobacco concern?

A. I know that.

X-Q. 57. Manufacturers and sellers of tobacco?

A. Yes.

X-Q. 58. You never heard of them making any food products, did you?

A. Not that I can recall.

X-Q. 59. Then, to anyone who had been in the tobacco business, the name "P. Lorillard Co." on that tobacco package would indicate to them that it was a P. Lorillard Company package, wouldn't it?

A. It would to me.

X-Q. 60. When you were in the tobacco business you would not sell the P. Lorillard products to a man who asked for Beech-Nut Packing Company cigarettes, would you?

A. No.

X-Q. 61. What was the name of the party who asked if the Beech-Nut Packing Company was controlled or owned by the P. Lorillard Co.?

A. Mr. C. A. Wilkins, West Lynn, Mass.

X-Q. 62. What did you tell him?

A. I told him that I didn't know.

X-Q. 63. Well, do you know who does control the Beech-Nut Packing Company?

A. I know it is a stock company.

X-Q. 64. But you don't really know anything about the ownership of it, do you?

A. Why, I can't say that I do.

X-Q. 65. What business is this Dennis Callahan in?

A. Wholesale tobacco business.

X-Q. 66. What is his address?

A. Washington street, Salem, Mass. I just don't know the number.

X-Q. 67. What was it he wanted to know from you last week?

A. If P. Lorillard Company owned the Beech-Nut Packing Company.

X-Q. 68. When you were on the road selling cigars did you sell any products of the P. Lorillard Company, any tobacco products, any cigars or cigarettes, or anything like that?

A. I did.

X-Q. 69. What did you sell?

A. Muriel cigars.

X-Q. 70. I show you a small tin package, and ask you if you recognize that?

A. "Between the Acts."

X-Q. 71. Yes. What is it?

A. It is a little cigar.

X-Q. 72. A little cigar?

A. Yes, sir.

X-Q. 73. Did you ever sell them?

A. Yes, sir.

X-Q. 74. Do you know who makes that?

A. I didn't until just now.

X-Q. 75. Who does make it, as indicated to you by the box?

A. P. Lorillard Co.

X-Q. 76. You didn't handle little cigars, or all tobacco cigarettes when you were selling, did you?

A. Yes; "Little Bees."

X-Q. 77. Whose brand is that, do you know?

A. You have got me, I couldn't tell you.

X-Q. 78. Neither can I.

A. I never noticed.

X-Q. 79. If you went into a store and asked for a package of Beech-Nut chewing gum, a product of the Beech-Nut Packing Company, would you be confused or deceived into taking cigarettes like that, Plaintiff's Exhibit No. 1, the Beech-Nut cigarette?

A. No, not for the chewing gum, I would not.

X-Q. 80. In other words, an unscrupulous dealer could not fool you into taking cigarettes for chewing gum, could he?

A. No.

Mr. Cavanagh: I guess that is all.

Mr. Hinton: I have nothing further.

Deposition closed.

R. W. BLANCHARD.

O. A. HUBBARD, a witness called on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. O. A. Hubbard; home address, 51 Morrison road, Braintree, Mass.; business address, 743 Main street, Cambridge, Mass. That is the service station of the Beech-Nut Packing Company. I am division manager for the Beech-Nut Packing Company; my age is 51.

Q. 2. How long have you been with the Beech-Nut Packing Company, Mr. Hubbard?

A. Nineteen years.

Q. 3. At the beginning of that time, what was the principal product of the Beech-Nut Packing Company?

A. They only had two products when I went to work for them; the whole line has come out practically in that time.

Q. 4. What has been your experience in selling these Beech-Nut Packing Company products, as they came out?

A. It has always been a very easy matter to introduce anything with the Beech-Nut label on.

Q. 5. What is the situation with respect to Beech-Nut gum; is that easy to sell, or difficult to sell?

A. It is a good deal easier to sell than to get. There has hardly been a time in the last seven or eight months that we could fill our orders. In fact, for the last few months, since the first of January this year, we haven't been allowed to take on new customers; and the old ones have been supplied from one-half to one-third what they ought to have.

Q. 6. Where is Beech-Nut gum sold to the public, in what kind of stores, or over what counters?

A. Almost all stores, drug stores, delicatessen stores, tobacco stores, and these little fruit stands—most every stand of every kind, candy counters, where mints and confections are sold.

Q. 7. I show you a package, which is in evidence in this case as Beech-Nut Exhibit No. 1, being a package of Beech-Nut cigarettes. Do you remember when these cigarettes came out in this territory, and if so, when was it?

A. It was sometime the latter part of March or April, I don't remember the exact date.

Q. 8. 1921?

A. Yes, sir.

Q. 9. When you first saw this package, by whom did you believe that these cigarettes were being put out?

A. Well, the first time I saw it, several called my attention to it, and I bought a package, and I saw the name P. Lorillard Co. on it on close examination.

Q. 10. The last question is repeated.

A. I thought it was a new Beech-Nut product, until I bought a package.

Q. 11. Why did you buy this package and make a close examination of it?

A. Well, I thought it strange that there would be a new product come on the market without my hearing it, or their sending me samples, and I thought the only way to determine it was to buy a package and examine it.

Q. 12. When these cigarettes were first offered in this territory, did you hear any comments or remarks in the course of your work for the Beech-Nut Packing Company; if so, please state the nature of those remarks which were made to you, and the extent to which they were made?

A. Well, I heard innumerable remarks and statements made, and questions asked of me regarding this product from our jobbers and customers and friends and acquaintances. I didn't keep any track of the number, but it must have gone into the hundreds.

Q. 13. What was the nature of those remarks?

A. Well, they asked about the new product, and said if it was going to be as good as the gum, they thought it would sell, and how long had they been putting it up, and to what extent were we going into it, whether we were going to make cigars, or what the end would be.

Q. 14. In your last answer you said that people asked you how long "they" had been putting it out. Who did you mean by "they"?

A. By "they" they referred to the Beech-Nut Packing Company.

Mr. Hinton: Direct examination closed.

*Cross-Examination.*

X-Q. 15. (By Mr. Cavanagh.) Mr. Hubbard, do you today have charge of handling of a complete line of products put up by the Beech-Nut Packing Company?

A. In this division; yes, sir.

X-Q. 16. You handle the complete line?

A. Yes.

X-Q. 17. Do you handle any of the Mohawk brand of goods?

A. Very little.

X-Q. 18. They have a Mohawk brand of goods?

A. Yes.

X-Q. 19. Can you name any other brand than the Mohawk?

A. The Erie, that is still another brand they have.

X-Q. 20. Have they any others that you know of?

A. That don't bear the Beech-Nut label, you mean?

X-Q. 21. Yes, other brands.

A. No, I don't recall any.

X-Q. 22. What is the nature of the products that you handle?

A. Well, they are very largely food products, with the exception—I don't know whether you would hardly list gum as a food product. I don't know just what category that would belong to—I don't know about that; but of course it is very largely food products.

X-Q. 23. You never knew in your nineteen years' experience of the Beech-Nut Packing Company handling tobacco or cigarettes?

A. I heard they put out some cigarettes. I have never seen a package in this territory.

X-Q. 24. Did you ever sell a package of Beech-Nut cigarettes put out by the Beech-Nut Packing Company?

A. No, sir.

X-Q. 25. Did you ever sell any tobacco product of the Beech-Nut Packing Company?

A. No, sir.

X-Q. 26. Did you ever receive any instructions from the Beech-Nut Packing Company that they were going to put out cigarettes or any other tobacco product?

A. No, sir.

X-Q. 27. Do you smoke?

A. Yes, sir.

X-Q. 28. What do you smoke?

A. Pipe mostly.

X-Q. 29. Did you ever smoke cigarettes?

A. Why, yes; but I am not any judge of them, and I probably never smoked three packages in my life.

X-Q. 30. Where did you first purchase this package of Lorillard Beech-Nut cigarettes?

A. Well, I am not sure that I purchased it. I think a man by the name of Phillip Dimodica gave me a package. I am pretty positive that he gave me this package; that I had two packages—one, I know Mr. McKay, the buyer at the South Station restaurant, brought in and gave me, at the time we had a sales meeting at the South Station, and he brought this package in, and I am pretty sure that Dimodica, the candy manufacturer, gave me this other package. I would not swear that I purchased that, I don't think I did. I believe that he passed me this package, this first one I saw.

X-Q. 31. Have you purchased any Beech-Nut Lorillard cigarettes since that time?

A. No.

X-Q. 32. When you took this first package in your hand and examined it, you saw the name P. Lorillard Co. on it?

A. I did.

X-Q. 33. That indicated to you that that was their product?



A. It did; just as soon as I got the package and examined it, and saw the name, "P. Lorillard Co." on it, I was satisfied then.

X-Q. 34. You knew it was not a Beech-Nut Packing Company product?

A. Yes, sir.

X-Q. 35. And you knew it was a product of the P. Lorillard Co.?

A. I did, when I saw the package.

X-Q. 36. Did you ever know of any person who went into a store and asked for cigarettes made by the Beech-Nut Packing Company and were handed cigarettes like this P. Lorillard Co. package?

A. I don't think so.

X-Q. 37. You don't know that you ever did, do you?

A. I don't know that I do.

X-Q. 38. You never heard of any such person?

A. One that went in and asked for Beech-Nut cigarettes?

X-Q. 39. Beech-Nut cigarettes of the Beech-Nut Packing Company, and were passed the Lorillard cigarette?

A. No, I can't say that I do.

X-Q. 40. As I understand it, you handle the Beech-Nut gum?

A. Yes, sir.

X-Q. 41. Did you ever know of any person who went into a store, or other establishment, wanting and asking for Beech-Nut chewing gum of the Beech-Nut Packing Company, and was confused and deceived into taking a package of the Lorillard cigarettes?

A. No, sir.

X-Q. 42. Well, if you went into a store and wanted a package of chewing gum or any other Beech-Nut product with which you were familiar could you be confused or deceived into taking a package of Lorillard Beech-Nut cigarettes?

A. I don't think so.

X-Q. 43. Well, you know you would not, don't you?

A. Yes.

X-Q. 44. I show you a package of Beech-Nut scrap tobacco, which is in evidence in this case as Defendant's Cross-Exhibit No. 1. Did you ever see a package like that before?

A. Today is the first time I ever saw it.

Mr. Hinton: This is objected to as outside of the line of direct examination.

Mr. Cavanagh: The witness has testified that he is familiar with the various products that are sold in tobacco stores, so far as concerns the Beech-Nut Packing Company, and I simply want to test his knowledge in this direction.

X-Q. 45. Did you know of any Beech-Nut Packing Company product having these red radiating lines on the package?

A. No, but there is a certain similarity, as compared with some of our labels—similar labels, but they are a little different; they might be blue or they might be red, those lines running around.

X-Q. 46. Did you ever know them to use any red radiating lines like these?

A. No, not that same kind.

X-Q. 47. If you saw a package with red radiating lines on it, similar to these, would you think it was a Beech-Nut Packing Company product?

A. If I saw the "Beech-Nut" and the nuts on there, I should want to look at it again.

X-Q. 48. If you looked at it again, examined it closely, would you take that for a Beech-Nut Packing product?

A. No, I would not now. Still, if I was around a store and I saw that "Beech-Nut" and the nuts there, I should want to look at it a second time.

X-Q. 49. And then, after you had looked at it, you would say it was not a Beech-Nut Packing Company product, but a Lorillard, would you not?

A. After I looked at it, yes.

Mr. Cavanagh: I guess that is all.

Mr. Hinton: That is all.

The further taking of testimony was adjourned to Worcester, Massachusetts, at 10 o'clock A. M., Thursday, August 18, 1921.

Deposition closed.

O. A. HUBBARD.

#### STIPULATION.

It is stipulated by and between the parties, through their respective counsel, that the exhibits in this case may be retained in the custody of the counsel offering the same, to be produced at the trial, subject to inspection by either side.

It is further stipulated that exhibits such as packages of cigarettes, which may be destroyed by repeated handling, may from time to time be replaced by new and identical packages, marked with the original exhibit numbers.

#### STIPULATION.

It is stipulated by and between the parties hereto, through their respective counsel, that in order to expedite the taking of testimony, and in appreciation of the difficulty of obtaining the attendance of a Master in small towns, and so forth, any and all formalities in the taking of the foregoing depositions are hereby waived, and it is agreed that the said depositions shall have the same weight and effect as though taken by a duly authorized Special Examiner.

## STIPULATION.

It is stipulated by and between the parties hereto, through their respective counsel, that in order to suit the engagements of counsel and expedite the prosecution of the case, plaintiff's time for pleading to the answer, and the answer to counterclaim therein contained, may be extended thirty days.

It is further stipulated that the plea to the answer and the answer to the counterclaim may be filed *nunc pro tunc*, as of the date of August 16, 1921, to take precedence over the testimony herein taken.

This stipulation is made to suit the engagements of counsel, and to permit certain testimony to be taken in New England during the month of August, 1921, at a time most convenient for both counsel.

I, L. W. DePass, a notary public within and for the County of Suffolk, Commonwealth of Massachusetts, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of Harry S. Cohen, Robert Skene, Jr., A. W. Godfrey, Arthur A. Skinner, John J. King, Richard E. Pope, John F. Lapham, Thomas F. Maloney, W. G. Torrey, Margaret Hunt, Leo Lewis, R. W. Blanchard and O. A. Hubbard, were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me, at Boston, Massachusetts, beginning August 16, 1921; that each of the foregoing witnesses was by me duly sworn; that the testimony of said witnesses was taken down in shorthand, under my supervision, by Whitman W. Collins, a court reporter, well known to me, and thereafter reduced to typewriting; that the opposing party hereto was represented by Richard B.

Cavanagh during the taking of said testimony; that the testimony was taken at the Chamber of Commerce Building, Boston, Mass., and at the Touraine Hotel, Boston, Mass., beginning at 10 A. M., August 16, 1921, and ending August 17th, 1921; that the said deposition of each witness was read by said witness before signing the same, except where the signature of a witness was waived, as indicated on the deposition.

I am not connected by blood or marriage with either of the parties hereto, or interested either directly or indirectly in the matter in controversy.

L. W. DePASS.

[SEAL.]

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT  
OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,	}	
<i>Defendant.</i>		

Deposition taken on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before me, James E. Connor, a notary public within and for the County of Essex, Commonwealth of Massachusetts, acting as Special Examiner by consent of counsel, at No. 25 Central Square, Lynn, Massachusetts, on Friday, August 19, 1921, beginning at 10 o'clock A. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, attorneys for the Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, attorneys for P. Lorillard & Company.

CLARENCE A. WILKINS, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, in pursuance to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, and occupation.

A. Clarence A. Wilkins; residence, 3 Myrtle Street; business at 623 Boston Street, Lynn, Mass.

Q. 2. And your occupation?

A. News dealer, stationery, and general variety store. I don't know just how you would class it.

Q. 3. Will you please state what you carry and offer to the public in your store, Mr. Wilkins?

A. Cigars, tobacco, confectionery, soda, ice cream, a few patent medicines, newspapers and periodicals of all sorts.

Q. 4. I show you a package of cigarettes, such as in evidence in this case as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes. Will you please state whether you have sold these goods over your counter, and if so, approximately how long have you sold them?

A. Oh, since last spring—since the spring time, I won't say what time.

Q. 5. Now, Mr. Wilkins, can you tell me about the quantities of these cigarettes that you have personally sold over the counter, since last spring?

A. I cannot tell you the exact quantity, but I know I average about 400 cigarettes a week—well, that is a fair average, I should say. I may have sold more.

Q. 6. Can you tell me, Mr. Wilkins, whether or not the name of the manufacturer of these cigarettes appears on the package?

A. I cannot.

Q. 7. Since you have been selling these cigarettes over the counter, have you heard comments, inquiries, or the like, from your customers over the counter about these cigarettes? If so, will you please state the nature of those comments, inquiries and remarks?

A. Several times I have been asked if they were made by the same people who manufacture the Beech-Nut gum.

Q. 8. When you first saw these cigarettes, by whom did you think, yourself, that they were made?

A. The Beech-Nut products people, naturally.

Q. 9. And where are these Beech-Nut products people located, do you know?

A. I do. Canajoharie, New York. I have been down there and seen the factory.

Q. 10. Mr. Wilkins, do you recall ever having a conversation with Mr. Blanchard about the Beech-Nut cigarettes? If so, will you tell me in a general way, what the conversation was?

A. Why, if I remember it correctly, I think I asked him if they were—if the Beech-Nut product people were owned by the P. Lorillard Company.

Q. 11. Do you know what suggested that idea to your mind?

A. Well, nothing more than the specialty man of the Lorillard Company had been along and I had given him an order for cigarettes. That is how I found that they were manufactured by the Lorillard Company.

Q. 12. Now, what I want to get at is, why the idea came into your mind that the Lorillard Company owned or controlled the Beech-Nut Company; what was it that brought that idea to your mind, do you remember?

A. No special reason, only the reason that large manufacturing concerns do not use the same trade-marks, or apparently the same trade-marks, without having some understanding that one or the other of the companies is behind the other.

Mr. Hinton: Direct examination closed.

*Cross-Examination.*

X-Q. 13. (By Mr. Cavanagh.) Are you the owner of your business, Mr. Wilkins?

A. Yes.

X-Q. 14. How many people do you employ there?

A. At present only one. That is, the boy. My wife is my only help at present, outside of my boy.

X-Q. 15. Do you do a large business in tobacco, or is it a retail business?

A. Well, it is a retail—I don't know whether to call it a large business.



X-Q. 16. It is a retail business?

A. Yes.

X-Q. 17. And you sell various brands of tobacco products?

A. Yes, I do.

X-Q. 18. What do you sell?

A. I don't know that I can give you a list of the whole thing, but all the popular brands.

X-Q. 19. You sell cigars, do you not?

A. Yes, sir, I do.

X-Q. 20. Do you sell the Muriel cigar?

A. Not lately; I have sold it.

X-Q. 21. And you got that from Lorillard, did you?

A. I bought that through a jobber; I don't know really who it came through, I think J. P. Manning, Boston.

X-Q. 22. Do you sell chewing tobacco; do you sell Beech-Nut scrap tobacco?

A. No Beech-Nut scrap; I knew nothing about it until yesterday.

X-Q. 23. But you do sell the Beech-Nut cigarette?

A. I do.

X-Q. 24. And you buy that from P. Lorillard Co.?

A. I buy it through a jobber; the original order was given to the Lorillard salesman.

X-Q. 25. When was that?

A. Sometime in the spring, I couldn't tell you. I never saved the copy of the order.

X-Q. 26. And is that the first you knew of the Beech-Nut cigarette?

A. I had heard of it probably several days before, but I knew nothing about it.

X-Q. 27. I show you a package which is in evidence in this case as Plaintiff's Exhibit No. 1. Is the package of Beech-Nut cigarettes like I show you, similar to the Beech-Nut cigarette that you sell?

A. Yes.

X-Q. 28. Whose name is on that?

A. I don't know. I will have to look. I think it is Lorillard. I don't know that I ever saw that before; I don't know that I ever noticed that name was on the package. One thing I did notice, which was called to my attention, and that was comparing this here with the Beech-Nut gum label—seeing the difference in this part of the label. But that was some time ago.

X-Q. 29. I noticed when you handled this package just now you pointed to the name "P. Lorillard Co." on the panel on the back of the package, and then turned it over and referred to the label on the front of the package. Does the name P. Lorillard Co. appear on the front of the package?

A. I don't know; I can't see it over here.

X-Q. 30. Will you look at it closely and see?

A. It may be there, but I don't see it.

X-Q. 31. Have you any trouble with your eyes?

A. I can't see much of anything now (removing glasses). I couldn't recognize you.

X-Q. 32. Your eye sight is really defective?

A. Yes, sir; I can't see it now.

X-Q. 33. I notice you replaced your glasses and said you couldn't see it.

A. Yes; I couldn't see anything on there now, anyway, through that paper there.

X-Q. 34. Will you explain to me then how you can read that name—

A. That is plain enough.

X-Q. 35. —on the back of the package, but can't read the name "P. Lorillard Co." on the front?

A. That is on a white background, and shows up. And if there is anything there, it doesn't show, so I can see it, on there. Up here I can see it, but nothing

down there. If there is anything down there I can't see a thing.

X-Q. 36. You are color blind, are you?

A. Somewhat. On that white background, I have no trouble at all, but anything there on the dark background, I would not see it at all. Black on red is almost out of sight to me.

X-Q. 37. You know of P. Lorillard Company, do you not?

A. Oh, yes, I have bought their goods for years, but I never bought anything direct from them, as I know of.

X-Q. 38. And that is a high class, reputable tobacco concern, are they?

A. Well, I suppose they are, that their reputation is good.

X-Q. 39. You don't know anything to the contrary?

A. No, I don't know anything to the contrary.

X-Q. 40. No one ever told you that the P. Lorillard Company owned or controlled or had any relation to the Beech-Nut Packing Company, did they?

A. Oh, no; that is merely a matter of discussion. One or two persons and myself, possibly at times just got to wondering whether they were connected or not.

X-Q. 41. Did you ever hear any discussion regarding it by anybody else?

A. No; there has been nothing definite about it said before, but we might meet and talk about it.

X-Q. 42. In your business, if a person came into your store and asked for a package of cigarettes, made by the Beech-Nut Packing Company, would you sell him a package of Lorillard cigarettes in place of it?

A. I couldn't now, because I know; I might at some-time, but I wouldn't now.

X-Q. 43. Would you deliberately palm them off on him?

A. No.

X-Q. 44. If a person came into your store and asked you for Beech-Nut chewing gum, made by the Beech-Nut Packing Company, would you sell him a package of cigarettes for chewing gum?

A. No, sir. Further I should question the Beech-Nut Packing Company—it is Beech-Nut Products Company, isn't it, as I have seen it? I am not sure of that.

X-Q. 45. And if you went into a store yourself and wanted Beech-Nut chewing gum, could you be deceived or confused into taking a package of Lorillard Beech-Nut cigarettes for a package of chewing gum?

A. No, I don't think so.

X-Q. 46. You would think a man was crazy that would take a package of cigarettes for chewing gum, would you not?

A. I should think he would be.

Mr. Cavanagh: That is all.

*Redirect Examination.*

R-D. Q. 47. (By Mr. Hinton.) If you went into a store, Mr. Wilkins, and wanted to buy a pick, would you accept a shovel in the place of the pick?

A. I certainly should not.

R-D. Q. 48. Will you please read for me the matter appearing on the white panel on the back of the Beech-Nut cigarettes; see if you can read it?

A. "Beech-Nut cigarettes. Mildest of all. Perfect quality. Delicious taste. P. Lorillard Co. Established 1760."

R-D. Q. 49. Did you have any difficulty in reading that, "Established 1760," on that package?

A. Not at all.

R-D. Q. 50. You wear glasses, do you not?

A. At all times, except when I am asleep.

R-D. Q. 51. And when you told Mr. Cavanagh you

could not recognize him, then you had your glasses raised from your eyes?

A. Yes, sir.

*Recross-Examination.*

R-X Q. 52. (By Mr. Cavanagh.) And when you said you could not read the name, "P. Lorillard Co." on the front of the Beech-Nut package, when I, Mr. Cavanagh, was examining you, you had your glasses down, didn't you?

A. I did.

R-X Q. 53. So you were looking through your glasses?

A. Yes, sir.

R-X Q. 54. And when Mr. Hinton just had you read off at that matter so rapidly on the back of the package, he showed you a package from which the glacé or transparent tissue paper had been removed?

A. Yes.

R-X Q. 55. And when I showed you the package, the wrapper was on; is that right?

A. That is right.

R-X Q. 56. And when you read the name "P. Lorillard Co." on the package, when I questioned you, you were looking through the glacé wrapper?

A. I was.

R-X Q. 57. And your glasses were in position?

A. Yes.

R-X Q. 58. Now, did you ever purchase any tobacco products from the Beech-Nut Packing Company?

A. No, I never purchased anything in that line from the Beech-Nut Packing Company that I know of.

Mr. Cavanagh: That is all.

*Redirect Examination.*

R-D. Q. 59. (By Mr. Hinton.) I show you a package of cigarettes, Plaintiff's Exhibit No. 1 in this case, which has the glacé or wax paper wrapper on it, and I invite your attention to the white panel containing black printing on the back of that package. Can you read that?

A. Easily.

R-D. Q. 60. Can you read "Established 1760" at the bottom?

A. I can.

R-D. Q. 61. With difficulty, or easily?

A. No, easily enough.

Mr. Hinton: That is all.

*Recross-Examination.*

R-X Q. 62. (By Mr. Cavanagh.) When you said you could not see me with your glasses off——

A. I said I could not recognize you.

R-X Q. 63. ——how far away was I sitting from you?

A. Four or five feet.

Mr. Cavanagh: That is all.

*Redirect Examination.*

R-D. Q. 64. Do you wear glasses all the time?

A. All the time.

Mr. Hinton: That is all.

Mr. Cavanagh: That is all.

Deposition closed.

CLARENCE A. WILKINS.

ALFRED WILLIAM STURGIS, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. Alfred William Sturgis; grocer; 819 Boston street, Lynn; I live upstairs; 43 years old.

Q. 2. How long have you kept a grocery store at that location?

A. Six years.

Q. 3. Do you carry tobacco products in your grocery store?

A. Yes, sir.

Q. 4. I show you a package of cigarettes, which is in evidence in this case as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes. Do you handle these cigarettes?

A. Yes, sir.

Q. 5. When you first saw these cigarettes, by whom did you believe they were made?

A. By the Beech-Nut Packing Company.

Q. 6. How long did you believe that these cigarettes were made by the Beech-Nut Packing Company; do you remember?

A. About ten minutes.

Q. 7. How did you find out that they were not?

A. Well, because I asked the salesman for the cigarettes, their agent, who takes the orders—they are shipped direct, you know, through the jobber, they are shipped direct from them to the store, but they put the bill through the jobber.

Mr. Hinton: Direct examination closed.

*Cross-Examination.*

X-Q. 8. (By Mr. Cavanagh.) I understand, Mr. Sturgis, that when you bought these cigarettes you bought them from some salesman?

A. Yes, sir; I bought them through, what do you call them—a fellow——

X-Q. 9. Agent or salesman or something like that?

A. Yes, sir; there is a special name for them. There is what they call the agent, they have the regular salesman for the jobber, but the salesman for the firm that manufactures.

X-Q. 10. What manufacturer was that?

A. Lorillard Company.

X-Q. 11. He was a Lorillard agent?

A. Yes, a Lorillard agent.

X-Q. 12. And he came to your store?

A. Well, he was agent for the——

X-Q. 13. Well—pardon me.

A. He was the agent for the one above, the jobber, what they call the agent in Boston, wherever it is, when they buy in bigger lots, you know.

X-Q. 14. And he came into your store and asked you for an order?

A. Well, he asked me if I wanted to buy some Beech-Nut cigarettes and other tobaccos, a combination, and I said yes.

X-Q. 15. You knew he was a Lorillard man?

A. Yes, sir.

X-Q. 16. And he told you that these cigarettes were not made by the Beech-Nut Packing Company?

A. No, he didn't tell me.

X-Q. 17. How did you find it out?

A. I asked him.

X-Q. 18. Asked him what?



A. I said, "I thought the Beech-Nut people made them," and he said, "No, we make them, the P. Lorillard Co."

X-Q. 19. And after he told you that, you gave him the order?

A. Yes.

X-Q. 20. And you bought P. Lorillard's goods because you had a sale for them?

A. Yes, sir; I bought these because of the demand for them; everybody was asking for Beech-Nut cigarettes.

X-Q. 21. And, as I understand it, you have always bought other Lorillard products?

A. Yes, sir.

X-Q. 22. Can you name some of them that you have bought; just name the brands?

A. The chewing tobacco—I don't know that I could call them all right off that they manufacture, but the brands I carry, Camels, Lucky Strike, Fatimas, Helmars, Sweet Caporal, large and small, and Perfections, and Beech-Nut, and the "111," that is about all I carry in the cigarette line, some made by one and some are made by another.

X-Q. 23. In carrying the Lorillard Beech-Nut cigarette, like this package, Plaintiff's Exhibit No. 1, you never told your customers that it was made by the Beech-Nut Packing Company?

A. No.

X-Q. 24. And you would not tell them it was a product of the Beech-Nut Packing Company?

A. No; nobody asked that question. If anybody had asked that question I would have told them that they were not made by that company.

X-Q. 25. Who would you have told them they were made by?

A. Lorillard, but I would sell them just the same.

X-Q. 26. What kind of gum do you sell?

A. Beech-Nut and the——

X-Q. 27. Made by the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 28. If a person came into your store and asked you for a package of Beech-Nut chewing, made by the Beech-Nut Packing Company, would you sell him a package of Beech-Nut cigarettes in place of it?

A. No.

X-Q. 29. Would you think a person was crazy that would take a package of Beech-Nut cigarettes for a package of Beech-Nut chewing gum?

A. Yes, sir.

Mr. Cavanagh: That is all.

Deposition closed.

ALFRED WILLIAM STURGIS.

IDA W. WILKINS, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, in pursuance of notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you please give me your name, residence and occupation, Mrs. Wilkins?

A. Mrs. Ida W. Wilkins; 623 Boston street, West Lynn, Mass.; I am jack at all trades; I am postmistress part of the time, and housekeeper and storekeeper.

Q. 2. Are you the wife of Mr. C. A. Wilkins, who has testified in this case this morning?

A. I am.

Q. 3. Mrs. Wilkins, do you carry Beech-Nut cigarettes similar to the package I show you, which is in this case as Plaintiff's Exhibit No. 1?

A. Yes, sir.

Q. 4. Do you know how long you have sold these cigarettes in this store?

A. I don't know as I know; I think ever since they came out. I don't know how long that is.

Q. 5. Would that be this year or last?

A. Oh, yes, it would be this year, I should say. I don't do the buying, so I wouldn't understand about that as well as Mr. Wilkins.

Q. 6. When you first saw this brand of cigarettes, by whom did you believe that they were made?

A. Why, I believed that the Beech-Nut people made them.

Q. 7. Do you carry any of the products made by the Beech-Nut people?

A. Yes, the Beech-Nut gum; that is all.

Q. 8. Do you remember when Mr. Blanchard, the gentleman over there, came into this store last week, and whether or not you asked him anything when he came in?

A. Yes; I asked him if he was the Beech-Nut cigarette man, and if the Beech-Nut people put out the Beech-Nut cigarette.

Q. 9. I see. When, Mrs. Wilkins, were you first told or informed that the Beech-Nut people did not put out the Beech-Nut cigarette?

A. Well, that is the day Mr. Blanchard came, when I asked him, whatever day that was.

Mr. Blanchard (interrupting): It was Thursday, the 11th.

Q. 10. Mrs. Wilkins, have you heard over your counter any comments or remarks by your customers about these Beech-Nut cigarettes?

A. Yes, I have; several people have asked if the same people that made the gum made the cigarettes.

Mr. Hinton: I see. That is all.

*Cross-Examination.*

X-Q. 11. (By Mr. Cavanagh.) Who do you buy these Beech-Nut cigarettes from?

A. Well, I don't do the buying at all; Mr. Wilkins does the buying.

X-Q. 12. So you don't do the buying?

A. No, I don't do the buying. I don't know whether we get them from Manning or Tucker. We trade with both Manning and Tucker.

X-Q. 13. You have never taken any trouble to observe that package, have you?

A. No, only as I put it out, not to go through it closely, all the reading on it, and look at it.

X-Q. 14. Whose name is that written on it?

A. P. Lorillard Co., I see written on it.

X-Q. 15. So, if you had observed that package closely, you would have known that it was a P. Lorillard Co. cigarette?

A. Yes, sir; the Lorillard tobacco company.

X-Q. 16. Did you ever hear of the Beech-Nut Packing Company putting out any cigarettes at all?

A. No; I didn't know anything about it.

X-Q. 17. I understood you to say that you sell Beech-Nut chewing gum?

A. Yes, sir; lots of it.

X-Q. 18. If a customer came into this store and asked you for a package of Beech-Nut chewing gum, would you sell him a package of P. Lorillard's Beech-Nut cigarettes in place of the chewing gum?

A. Not if they asked for gum, but they say, "Give me a package of Beech-Nut"; that is what puzzles me. I had an instance of that, he said, "Give me a package of Beech-Nut," and I reached out for gum, and he said, "I meant cigarettes." So I went clear across the store

and got the cigarettes. They don't usually add on "cigarettes," they say, "Give me a package of Beech-Nut."

X-Q. 19. But if they wanted cigarettes, you would not sell them Beech-Nut chewing gum in place of them?

A. No.

X-Q. 20. And if they took the cigarettes in the place of gum, or they took gum in the place of cigarettes, you would think they were crazy, would you not?

A. Of course I should, and I should think that I was crazy to give it to them.

X-Q. 21. If a person came into this store and asked you for a package of cigarettes made by the Beech-Nut Packing Company, would you sell him Lorillard cigarettes?

A. I would not now, now that I know. I would say, "Well, I haven't got them, made by those people."

X-Q. 22. You never knew a person to come into this store and ask for cigarettes made by the Beech-Nut Packing Company?

A. No, I never knew of one.

Mr. Cavanagh: That is all.

*Redirect Examination.*

R-D. Q. 23. (By Mr. Hinton.) I call your attention to this oval device on the front of this package of cigarettes, containing the name, "Beech-Nut," and underneath it the beech-nut cluster. What manufacturer does that label suggest to you?

A. Why, the "Beech-Nut" suggests that the Beech-Nut Packing Company makes them, naturally, because they have other advertisements of the same kind, and it is so common, you know.

Mr. Hinton: That is all.

*Recross-Examination.*

R-X Q. 24. (By Mr. Cavanagh.) Mrs. Wilkins, haven't you ever seen and sold other goods which had labels bearing an oval on them?

A. Oval?

R-X Q. 25. Yes, the shape of a ring, or ellipse.

A. You mean a cigarette?

R-X Q. 26. Anything.

A. No—I am trying to recall what others there are. I don't know really what others. There are circles, but I don't know about ovals.

R-X Q. 27. I notice in your case here a Proctor cigar box label. What is the shape of that label?

A. Well, it is not so long an oval as on the Beech-Nut; it is nearer round.

Mr. Cavanagh: That is all.

*Redirect Examination.*

R-D. Q. 28. (By Mr. Hinton.) Mrs. Wilkins, would you ever confuse that Proctor cigar label which Mr. Cavanagh has called to your attention, with the Beech-Nut Packing Company label?

A. No.

R-D. Q. 29. It would be impossible, would it not?

A. I don't see how it would be possible. It has "Proctor" written across the label there. If it said "Beech-Nut," I might.

Mr. Hinton: That is all.

*Recross-Examination.*

R-X Q. 30. (By Mr. Cavanagh.) Mrs. Wilkins, I show you a label of the Beech-Nut Packing Company, which has been marked in this case for identification Defendant's Cross-Exhibit No. —, and I show you a package of Beech-Nut cigarettes. Is that oval on the Beech-Nut

cigarette, outside of its elliptical shape, like that Beech-nut oval?

A. The gold on that ring here and the red lettering here, it is a little different, of course. The oval itself, you mean?

R-X Q. 31. You pointed to the "Beech-Nut."

A. Yes, sir—yes, it has all the Beech-Nut red, just the same.

R-X Q. 32. And how about the shape of the oval, the color of the oval?

A. It is white, and has not this interlining of red.

R-X Q. 33. And it has not the wide red band around it, has it?

A. No.

R-X Q. 34. And the Beech-Nuts are different?

A. Yes, the nut with the leaves on here, I should say they were just the same beech-nuts as these without the leaf, wouldn't you?

Mr. Cavanagh: That is all.

*Redirect Examination.*

R-D. Q. 35. (By Mr. Hinton.) Mrs. Wilkins, do you know whether all the labels used by the Beech-Nut Packing Company—I mean the regular Beech-Nut labels used by the Beech-Nut Packing Company, are all exactly alike, or do they vary?

A. I should say what I have used, that they are alike.

R-D. Q. 36. I mean in the small details?

A. I never examined them minutely, you know, because I have not had any occasion, so I couldn't say as to that.

Mr. Hinton: That is all.

Deposition closed.

(MRS.) IDA W. WILKINS.

The further taking of depositions adjourned to Salem, Mass.

I, James E. Connor, a Notary Public within and for the County of Essex, Commonwealth of Massachusetts, acting as special Examiner by consent of counsel, do hereby certify that the foregoing depositions of Clarence A. Wilkins, Alfred William Sturgis and Ida W. Wilkins were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me at Lynn, Massachusetts, on the 19th day of August, A. D. 1921; that each of the above named witnesses was by me duly sworn; that the testimony of said witnesses was taken in short-hand, under my supervision, by Whitman W. Collins, a court reporter, well known to me, and thereafter reduced to typewriting; that the opposing party was represented by Richard B. Cavanagh during the taking of said testimony; that the testimony was taken at 25 Central Square, Lynn, Massachusetts, and 623 Boston street, West Lynn, Massachusetts, beginning at 10 o'clock A. M., August 19, 1921, and ending at 12 o'clock, noon; that the deposition of each witness was read by said witness before signing the same, except where the signature of a witness was waived, as indicated on the deposition.

I am not connected by blood or marriage with either of the parties hereto or interested directly or indirectly in the matter in controversy.

JAMES E. CONNOR,  
Notary Public.

[SEAL.]

My commission expires Sept. 2, 1921.



IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT  
OF NEW JERSEY.

Beech-Nut Packing Company, Plaintiff, vs. P. Lorillard Company, Defendant.	}	In Equity No. 3056.
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Depositions taken on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before me, J. F. Dalton, a notary public within and for the County of Essex, Commonwealth of Massachusetts, acting as Special Examiner by consent of counsel, at 127 Washington Street and 128 Washington Street, Salem, Massachusetts, on Friday, August 19, 1921, beginning at 2 o'clock P. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, attorneys for the Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, attorneys for P. Lorillard & Company.

EDWARD MOSCOVITZ, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. 160 Lafayette Street, Salem, Mass.; I am clerk at Schrivens Cigar Company store.

Q. 2. And that store is located at what place?

A. 127 Washington Street, Salem, Mass.

Q. 3. Did you say what your age was?

A. I am 25 now.

Q. 4. How long have you been a clerk in this store?

A. I have been with them about nine months, with this company.

Q. 5. Did you sell tobacco products before that?

A. Yes; I had a store myself.

Q. 6. Is this a retail store?

A. Yes, wholesale and retail both. It is mainly retail, but we do sell wholesale.

Q. 7. I show you a package of cigarettes which is in this case as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes, and ask you when you first saw these cigarettes, by whom did you think they were made?

A. By the Beech-Nut gum company.

Q. 8. Will you please state whether you now believe that these cigarettes were made by the Beech-Nut gum company?

A. No, I should say not, for the simple reason I inquired of the salesman of the Beech-Nut Company, and he explained to me that it is an entirely different company, and I know now that it is, that it is not concerned with the Beech-Nut gum company.

Q. 9. Did you have them on sale here at the time you inquired of this salesman?

A. Yes; we had them on sale already; that was the first or second week after we had them in.

Q. 10. And in that one or two weeks, had you sold these cigarettes over the counter?

A. Yes.

Q. 11. Yourself?

A. Yes.

Mr. Hinton: That is all the direct examination.

*Cross-Examination.*

X-Q. 12. (By Mr. Cavanagh.) How long have you been in the tobacco business altogether?

A. Well, I will tell you; I had a store myself about a year, and I have been with them about nine months, so I have been in the business about two years.

X-Q. 13. You know the P. Lorillard Company, do you?

A. Yes.

X-Q. 14. And you handle their goods?

A. Some of it, I do.

X-Q. 15. You sell the Beech-Nut cigarettes?

A. Yes.

X-Q. 16. Do you sell the Beech-Nut scrap tobacco?

A. Yes.

X-Q. 17. Whose tobacco is that?

A. I think it is made by the American Company, isn't it? It is made by the American Company, I think.

Mr. Hinton: Questions about the Beech-Nut scrap tobacco are objected to as outside the direct examination.

X-Q. 18. Does it say what company it is made by (passing package to witness)?

A. Is it made by the Lorillard Company?

X-Q. 19. Will you examine the package and see if you can tell who it is made by?

Mr. Hinton: It is noted that the witness is examining the package for nearly a minute.

A. Well, I don't know yet by whom it is made. I presume it is made by Lorillard.

X-Q. 20. Why do you presume it is?

A. Isn't that the company?

X-Q. 21. Why do you say you presume it is?

A. I mean that on there.

X-Q. 22. You mean that the name Lorillard is—

A. Yes; that is what it is, and I think it is made by this company.

X-Q. 23. Whose name is on that package of Beech-Nut cigarettes?

A. That is Lorillard Company. Now, I see it is made by the same company.

X-Q. 24. So you never really took the trouble to examine the cigarette package, that Beech-Nut cigarette package to know who it was made by?

A. No.

X-Q. 25. When you were under the impression that that cigarette was the Beech-Nut Packing Company product, you hadn't taken the trouble to examine the package to know?

A. No.

X-Q. 26. If a customer came into this store and asked you for a package of Beech-Nut chewing gum, would you sell him a package of these Lorillard cigarettes for chewing gum?

A. I say, when a customer comes in and says "Beech-Nut," I usually ask him what he wants, whether Beech-Nut cigarettes or gum.

X-Q. 27. (Question repeated.) And if he wanted Beech-Nut chewing gum, you would not sell him a package of Beech-Nut cigarettes?

A. Of course not.

X-Q. 28. You never did?

A. No, it never happened to me yet.

X-Q. 29. And you yourself would not go into a store, if you wanted a package of Beech-Nut cigarettes, and take in place of it a package of chewing gum?

A. No.

X-Q. 30. You would think a man would be insane or

crazy that would take a package of tobacco or cigarettes in the place of gum, would you not?

A. Yes, sure, I would.

X-Q. 31. Do you know any of the Lorillard agents that come here?

A. Some of their salesmen come in quite often. I know quite a number of them.

X-Q. 32. Who are they?

A. I couldn't tell their names. One fellow particularly comes in—he used to be here, but he was not for some time for a long while. I don't recall his name.

X-Q. 33. You don't recall his name?

A. No, I can't recall the names of them, but they come quite often in the store.

Mr. Cavanagh: That is all.

Deposition closed.

EDWARD MOSCOVITZ.

CHARLES E. GEARY, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Charles E. Geary.

Q. 2. Age.

A. 23.

Q. 3. Residence.

A. 11½ Hardy street.

Q. 4. Occupation.

A. I am clerk in here, that is all.

Q. 5. Is this a drug store that you are working in?

A. Yes.

Q. 6. Do you sell cigarettes and tobacco here?

A. Yes, sir.

Q. 7. Do you sell the Beech-Nut cigarette, similar to this package which I now show you, and which is in this case as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes?

A. Yes.

Q. 8. When you first saw this cigarette, and sold it, by whom did you believe that they were made?

A. The Beech-Nut people.

Q. 9. Can you name any other products made by the Beech-Nut people that you sell here?

A. No, not outside of the gum.

Q. 10. How long did you continue to believe that these cigarettes were made by the Beech-Nut people?

A. Continuously, until I met you.

Q. 11. And do you remember what day that was?

A. A week ago last Wednesday, wasn't it?

Q. 12. Do you remember, Mr. Geary, when these cigarettes first came on the market, and were placed on sale in your store here?

A. About three or four months ago, I think.

Q. 13. And have you been since selling them over the counter?

A. I have.

Q. 14. Yourself, personally?

A. Yes, sir.

Mr. Hinton: That is all of the direct.

*Cross-Examination.*

X-Q. 15. (By Mr. Cavanagh.) You say you have been selling these cigarettes for the past three or four months, Mr. Geary?

A. Yes, about that time.

X-Q. 16. Whose name is that on the package I show you?

A. Lorillard.

X-Q. 17. Do you know what line of business P. Lorillard Company is in?

A. I think they are in the cigarette business.

X-Q. 18. Tobacco products?

A. Tobacco products, yes.

X-Q. 19. If you took the trouble to look at that package, you would know that P. Lorillard Company made it, would you not?

A. Naturally, if I had looked at it and saw it was marked with their name on it.

X-Q. 20. You never even took the trouble to look at that and see who made them?

A. No; I just passed them out.

X-Q. 21. Do you know who makes Anheuser beer, or did make it? Did you ever hear of Anheuser beer?

A. I have heard of it, yes.

X-Q. 22. I notice you have got in your window a can of Budweiser malt extract—

A. Yes.

X-Q. 23. —as I call it. Would you sell a can of it?

A. Sure, I would.

X-Q. 24. I would like to buy a can, if you don't mind.

A. You would like to buy a can of it?

X-Q. 25. Yes, I would; I would like to purchase a can of it now, if you will get a can.

A. Of course we have it for sale. Why should I object to it? Do you really want to purchase it?

X-Q. 26. Yes, I really do. I want to buy a can. (Can produced.) This can bears the name "Budweiser Malt Syrup" on it, doesn't it?

A. Yes.

X-Q. 27. Inside of an oval. Can you tell who that is made and sold by?

A. No, I don't do the buying.

X-Q. 28. Whose name appears on it?

A. Budweiser Malt—

X-Q. 29. Malt Products Corporation?

A. Yes, sir.

X-Q. 30. The Anheuser-Busch name does not appear on that, does it?

A. No, I don't see it.

Mr. Hinton: Objected to as immaterial and irrelevant.

X-Q. 31. How much is that can?

A. \$1.25.

X-Q. 32. Mr. Geary, if a person came into this store and asked you to sell them a package of Beech-Nut chewing gum, you would not sell them a package of Beech-Nut cigarettes, would you, in place of it?

A. In such a case I would remark about it, make the statement, which do they mean, Beech-Nut cigarettes or Beech-Nut gum—always did.

X-Q. 33. And you would not yourself, if you went into a store and wanted Beech-Nut cigarettes, you would not take a package of Beech-Nut chewing gum in place of it?

A. Naturally I would not, if I wanted the cigarettes, take the gum.

X-Q. 34. And you would think a person was crazy to take the cigarettes for gum, wouldn't you?

A. Why, sure.

Mr. Cavanagh: I think that is all. Oh, just one more question.

X-Q. 35. You would not mistake or confuse that can of Malt Syrup for a bottle of Budweiser beer, would you—Anheuser-Busch?

A. No, certainly not.



Mr. Hinton: Objected to as immaterial and irrelevant.

Mr. Cavanagh: That is all.

Deposition closed.

CHARLES E. GEARY.

The further taking of testimony was adjourned to Lawrence, Mass.

I, J. F. Dalton, a Notary Public within and for the County of Essex, Commonwealth of Massachusetts, acting as special examiner by consent of counsel, do hereby certify that the foregoing depositions of Edward Moscovitz and Charles E. Geary were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me at Salem, Massachusetts, on the nineteenth day of August, A. D. 1921; that each of the above named witnesses was by me duly sworn; that the testimony of said witnesses was taken in short-hand, under my supervision, by Whitman W. Collins, a court reporter, well known to me, and thereafter reduced to typewriting; that the opposing party was represented by Richard B. Cavanagh during the taking of said testimony; that the testimony was taken at 127 Washington street and 128 Washington street, Salem, Massachusetts, beginning at 2 o'clock P. M., and ending at 3 o'clock P. M., August 19, 1921; that the deposition of each witness was read by said witness before signing the same, except where the signature of a witness was waived, as indicated on the deposition.

I am not connected by blood or marriage with either of the parties hereto or interested directly or indirectly in the matter in controversy.

J. FRANK DALTON,  
Notary Public.

[SEAL.]

My commission expires Dec. 31, 1921.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT  
OF NEW JERSEY.

Beech-Nut Packing Company, <i>Plaintiff,</i>	} In Equity No. 3056.
<i>vs.</i>	
P. Lorillard Company, <i>Defendant.</i>	

Depositions taken on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before me, T. Edwin Andrew, a Notary Public within and for the County of Essex, Commonwealth of Massachusetts, acting as Special Examiner by consent of counsel, at Room 303, Bay State Building, Lawrence, Massachusetts, on Friday, August 19, 1921, beginning at 4 o'clock P. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, attorneys for the Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, attorneys for P. Lorillard & Company.

JAMES J. CREEVAN, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. John J. Creevan; age, 51; 203 Haverhill street, Lawrence, Massachusetts.

Q. 2. What is your occupation?

A. Salesman in a grocery store.

Q. 3. Where is that grocery located?

A. 34 Amesbury street, Lawrence, Mass.

Q. 4. Who is the proprietor?

A. M. J. Bailey.

Q. 5. Mr. Creevan, have you sold Beech-Nut products in this grocery store?

A. Yes, sir.

Q. 6. Have you seen Beech-Nut cigarettes similar to the package I now show you, which is in evidence in this case, as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes?

A. Yes, sir.

Q. 7. Mr. Creevan, can you relate an incident which happened in connection with these cigarettes in your store?

A. Yes, sir.

Q. 8. Will you please do so?

A. A man came in and asked for a jar of Beech-Nut marmalade; I told him it was the best marmalade we had in the shop, and I said, here is the Beech-Nut man right here now, and he will tell you all about it. The man said, "If it isn't any better than the cigarettes, it is no good."

Q. 9. What did the Beech-Nut man say?

A. I asked the Beech-Nut man if they didn't make the cigarettes, and he said, "No," so I sold the marmalade to the man then.

Q. 10. Now, this man was a customer, was he?

A. A customer, yes.

Q. 11. Did he ask for Beech-Nut marmalade, or just marmalade?

A. Marmalade.

Q. 12. What is the name of the Beech-Nut man who was there at the time?

A. The gentleman with you. I have forgotten your name.

Mr. Blanchard: Blanchard.

Q. 13. When you first saw these Beech-Nut cigarettes, by whom did you think they were put up?

A. By the Beech-Nut Company.

Q. 14. How long did you continue to believe that?

A. I believed that right along until this Mr. Blanchard told me that they did not.

Q. 15. Do you know why you believed that, Mr. Creevan?

A. Well, it had the same label, Beech-Nut label, as the advertising in the papers, and I knew they put out a line of gum, and lots of stuff, and naturally I thought it was the same label, they put up cigarettes, too.

Q. 16. You carry other marmalades in your store besides Beech-Nut marmalade?

A. Yes, sir.

Mr. Hinton: Direct examination closed.

*Cross-Examination.*

X-Q. 17. (By Mr. Cavanagh.) I understand, Mr. Creevan, you are engaged as a salesman in this store?

A. Yes, sir.

X-Q. 18. And you handle various lines of tobacco products?

A. No; no tobaccos.

X-Q. 19. You don't sell tobacco?

A. No, sir.

X-Q. 20. When did you first see this Beech-Nut cigarette package?

A. I saw it advertised in the papers, away back, perhaps, maybe three or four months, but I really forget how long since. It is advertised in the papers right here in the town.

X-Q. 21. Did you ever make inquiry or investigation to find out what concern actually manufactured the Beech-Nut cigarette?

A. No, sir.

X-Q. 22. You looked at that advertisement, did you?

A. I looked at the advertisement, yes sir. I may have spoken to some of the men that the Beech-Nut people were putting up cigarettes. I think I have made that remark.

X-Q. 23. Does that advertisement resemble the one you saw? I direct your attention to an advertisement on a page of the Boston Herald of August 18, 1921, and which is in this case marked for identification, Defendant's Cross-Exhibit No. 5. Does that look like the advertisement that you saw?

A. Yes, sir.

X-Q. 24. The name "P. Lorillard Co." appears on that advertisement, doesn't it?

A. Yes.

X-Q. 25. Do you notice the name Beech-Nut Packing Company on that advertisement in any place?

A. No.

X-Q. 26. Do you smoke?

A. No, sir; I don't smoke cigarettes, I smoke cigars and a pipe.

X-Q. 27. Did you ever buy a package of Beech-Nut cigarettes?

A. No, sir; never smoked a cigarette in my life.

X-Q. 28. Did you ever go into a store and ask for a package of Beech-Nut cigarettes?

A. No, sir.

X-Q. 29. Did you ever carefully examine a package of Beech-Nut cigarettes?

A. No, sir.

X-Q. 30. I show you this package of Beech-Nut cigarettes, which is in this case as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes; what name is on that package?

A. P. Lorillard Company.

X-Q. 31. If you saw that you would not think that it was a package put out by the Beech-Nut Packing Company, would you?

A. If I saw the name Lorillard on it, I would not.

X-Q. 32. Did you ever chew tobacco?

A. No, sir.

X-Q. 33. Did you ever see Beech-Nut scrap tobacco?

A. No, sir.

X-Q. 34. Like this package here that I show you?

A. I never did see one before.

X-Q. 35. You never saw that scrap tobacco?

A. No.

X-Q. 36. I understand that you have never sold tobacco?

A. In my present place of business?

X-Q. 37. Yes.

A. No, we have never kept tobacco there.

X-Q. 38. How long have you been in your present place?

A. I have worked at this Bailey store seventeen years.

X-Q. 39. If you went into a store and wanted a package of Beech-Nut chewing gum, the product of the Beech-Nut Packing Company, could you be deceived or confused into taking a package of cigarettes like this package of Lorillard cigarettes, for a package of chewing gum?

A. I don't think I would.

X-Q. 40. You would think anyone would be crazy that would take a package of cigarettes for a package of chewing gum, would you not?

A. I would naturally think that the Beech-Nut people put them up. Is that the way you want me to answer it?

X-Q. 41. No, my question is simply this: You would think a person, if they wanted to buy a package of chewing gum, that would allow anyone to pass off a package of Beech-Nut cigarettes on him, was crazy?

A. I think they would be.

X-Q. 42. You don't think a person would be deceived

into taking a package of chewing tobacco or cigarettes for chewing gum?

A. No.

X-Q. 43. When you spoke of this gentleman who wanted to buy the marmalade, you, of your own volition, recommended to him the Beech-Nut marmalade, didn't

A. Yes.

X-Q. 44. I understood you to say that you smoked cigars.

A. Yes.

X-Q. 45. And you know that every smoker has his favorite, and his own taste in regard to tobacco products, such as cigars?

A. Sure.

X-Q. 46. And that the cigars that you like the other fellow doesn't like, and *vice-versa*?

A. Very true.

X-Q. 47. And you find this in every line of business in regard to different articles, do you not?

A. Yes.

X-Q. 48. Different men probably have different preferences and tastes for goods of the same class?

A. Yes.

Mr. Cavanagh: I think that is all.

*Redirect Examination.*

R-D. Q. 49. (By Mr. Hinton.) Mr. Creevan, I don't think I asked you how long ago, approximately, was this incident of the man coming in and asking for marmalade. Do you remember?

A. About two months, I believe.

R-D. Q. 50. That would be in July or June?

A. It wouldn't be that long—it might be about July, I guess.

R-D. Q. 51. Do you remember when the Beech-Nut cigarettes first appeared in this territory?

A. Well, I have seen them advertised in the paper, the only way I knew about them.

R-D. Q. 52. Yes, but when, how long ago did you first see them advertised in this territory?

A. I really couldn't tell. It might be five or six months, but I would not be sure.

R-D. Q. 53. Now, you have said that you spoke to people and told them that the Beech-Nut people were putting out cigarettes. Were those people customers of yours in the store?

A. Yes, sir.

R-D. Q. 54. Mr. Creevan, can you tell me, recite to me a list of the products made by the Beech-Nut people, the whole list?

A. Well, I know quite a few of them. Marmalade, raspberry jam, strawberry jam, blackberry jam——

R-D. Q. 55. Well, to save time, I just wanted to know if you could give me the full list of the products or not. Just answer yes or no—all the products that they make.

A. No, sir.

Mr. Hinton: That is all.

*Recross-Examination.*

R-X Q. 56. (By Mr. Cavanagh.) You say you spoke to some men and told them that the Beech-Nut Company were putting out cigarettes. Were those customers?

A. Yes, sir.

R-X Q. 57. Upon what did you base that statement that these cigarettes were put out by the Beech-Nut Packing Company; you didn't make any investigation, did you?

A. No, sir, only the label.

R-X Q. 58. Did you look at the cigarette package itself?



A. I never saw the cigarette package until down here; you showed it to me.

R-X Q. 59. When was that?

A. About ten minutes ago, just as I came up.

R-X Q. 60. So the first time you saw a package of Beech-Nut cigarettes was today, August 19, 1921?

A. Yes, sir.

R-X Q. 61. And you say that this advertisement that you saw in this paper had P. Lorillard Company on it, and you don't find the name Beech-Nut Packing Company on it?

A. No.

R-X Q. 62. It was from that advertisement that you got the impression that the Beech-Nut Packing Company was putting the goods out; is that right?

A. Yes, sir.

R-X Q. 63. You never made a careful examination of the advertisement?

A. No, sir.

R-X Q. 64. Just glanced at it?

A. That is all.

R-X Q. 65. And never looked at the cigarettes until today?

A. No, sir.

Mr. Cavanagh: That is all.

Mr. Hinton: Deposition closed.

JAMES J. CREEVAN,  
203 Haverhill St.,  
Lawrence, Mass.

ROBERT JAMES WINTERS, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation?

A. Robert James Winters; age 26 years next birthday; residence 30 Salem Street, Andover, Mass.

Q. 2. Occupation?

A. Grocery clerk.

Q. 3. In what grocery store do you work?

A. M. J. Bailey's.

Q. 4. That is in Lawrence, Mass.?

A. 34 Amesbury Street, Lawrence.

Q. 5. Mr. Winters, have you ever before seen a package of Beech-Nut cigarettes, like a sample I now show you, Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes?

A. I have had a glimpse of them, just to look at them.

Q. 6. Have you seen the advertisement of this product that has appeared in this territory?

A. I have.

Q. 7. Have you ever smoked any of these cigarettes?

A. I have smoked one.

Q. 8. Where did you get that cigarette?

A. A friend of mine gave it to me. I asked him for a cigarette and he handed me one from a package.

Q. 9. He handed you a package of them?

A. He just took a package out, and I took a cigarette from his package.

Q. 10. By whom did you think these were made?

A. I assumed the Beech-Nut Packing Company.

Q. 11. How long did you entertain that belief?

A. Since I had smoked it. I think it was two or three months back.

Q. 12. Who would you think, if you just looked at that package, it was made by; would you think it was made by the Beech-Nut Packing Company?

A. I would, unless I examined it. For instance, as you hold it up, as it now is, I would naturally think it was a Beech-Nut Packing Company product.

Q. 13. When were you first advised that these cigarettes were not a product of the Beech-Nut Packing Company; do you remember how you first found it was not?

A. Yes; I think it was when you were in the store. I don't remember just the date, the exact date.

Q. 14. That was last week, was it?

A. Yes, last week.

Q. 15. Did I tell you that the Beech-Nut Packing Company did not make these cigarettes?

A. Yes, sir.

Q. 16. Do I understand that up to that time you believed that they did?

A. I was under the impression that they did.

Mr. Hinton: That is all.

*Cross-Examination.*

X-Q. 17. (By Mr. Cavanagh.) Do you sell tobacco products?

A. No, sir.

X-Q. 18. Cigarettes, cigars, chewing gums?

A. No, sir.

X-Q. 19. Did you ever buy a package of these Beech-Nut cigarettes?

A. No, sir.

X-Q. 20. Will you examine the package I show you, in this case as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes, and tell me what that name is on there?

A. I can't pronounce it. P. Lorillard Company, isn't it?

X-Q. 21. Does that indicate to you the manufacturer of that cigarette, the words "P. Lorillard Co."?

A. It does not say manufactured by them, does it?

X-Q. 22. Would you take it to be that they are the manufacturers?

A. I would know what it was, just what was the name just wrote across the package.

X-Q. 23. See if you can find the name Beech-Nut Packing Company in any place on that package?

A. No, I can't find it now.

X-Q. 24. I hand you a small package of mints. Can you tell me what name that is on there?

A. The Beech-Nut Packing Company.

X-Q. 25. Would you look over that and see if you see any words, "Manufactured by," on that any place?

A. No.

X-Q. 26. Whose goods would you take that to be?

A. By the label I should take it to be the Beech-Nut Packing Company, by the label, just glancing at it.

X-Q. 27. You don't know who manufactured that, do you?

A. No, sir. But I assume, though, it is a product of the Beech-Nut Packing Company, by the label.

X-Q. 28. But you don't know whether they manufacture it or not?

A. No, sir.

Mr. Cavanagh: The small package of Beech-Nut mints is offered for identification as Defendant's Cross-Exhibit No. 6.

X-Q. 29. I understood you to say on your direct examination that you saw an advertisement of Beech-Nut cigarettes. Is that similar to the advertisement that you saw? I call your attention to a page of the Boston Herald of August 18, 1921, marked for identification in this case as Defendant's Cross-Exhibit No. 5.

A. Yes.

X-Q. 30. Do you find the name "P. Lorillard Co." on that package?

A. Yes, on the bottom; yes.

X-Q. 31. Do you find the name, Beech-Nut Packing Company, anywhere on that advertisement?

A. No, sir; I can't see it anywhere.

X-Q. 32. Do you think you could be confused or deceived into buying a packing of Beech-Nut cigarettes for chewing gum?

A. No.

X-Q. 33. You would think a man was crazy to take cigarettes for chewing gum, wouldn't you?

A. Yes.

Mr. Cavanagh: I think that is all.

Mr. Hinton: Deposition closed.

ROBERT JAMES WINTERS.

I, T. Edwin Andrew, a Notary Public within and for the County of Essex, Commonwealth of Massachusetts, acting as special examiner by consent of counsel, do hereby certify that the foregoing depositions of James J. Creevan and Robert James Winters were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me at Lawrence, Massachusetts, on the nineteenth day of August, A. D. 1921; that each of the above named witnesses was

by me duly sworn; that the testimony of said witnesses was taken in shorthand, under my supervision, by Whitman W. Collins, a court reporter, well known to me, and thereafter reduced to typewriting; that the opposing party was represented by Richard B. Cavanagh during the taking of said testimony; that the testimony was taken at Room 303, Bay State Building, Lawrence, Massachusetts, beginning at 4 o'clock p. m. and ending at 5 o'clock p. m., August 19, 1921; that the deposition of each witness was read by said witness before signing the same, except where the signature of a witness was waived, as indicated on the deposition.

I am not connected by blood or marriage with either of the parties hereto or interested, directly or indirectly, in the matter in controversy.

(L. S.)

T. EDWIN ANDREW,  
*Notary Public.*

My commission expires October 24, 1924.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF  
NEW JERSEY.

Beech-Nut Packing Company }  
vs. } In Equity No. 3056.  
P. Lorillard Company.

Depositions taken before Penelope Comberbach, a Notary Public in and for the County of Worcester, State of Massachusetts, acting as Special Commissioner, by consent of counsel, pursuant to notice and agreement of counsel, at 918 Park Building, 507 Main Street Worcester, Massachusetts, on Thursday, August 18, 1921.

Present: Sebastian Hinton Esq., of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; Richard B. Cavanagh, Esq., of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

JOSEPH S. AISENBERG, a witness produced in behalf of the plaintiff, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Joseph S. Aisenberg; thirty-four years; wholesale grocer; 18 Woodford Street, Worcester, Mass.

Q. 2. Does your firm handle tobacco products for its grocery trade?

A. Yes.

Q. 3. What is the name of your firm?

A. United Wholesale Grocery Company.

Q. 4. What is your position with that firm?

A. I am general manager and buyer.

Q. 5. I show you a package of cigarettes which is in

evidence in this case as "Beech-Nut Exhibit 1." Have you ever seen these cigarettes before?

A. Yes.

Q. 6. State, if you can remember, about when you first saw these cigarettes.

A. Well, that I don't know.

Q. 7. Well, approximately?

A. I couldn't tell you. I remember seeing the ads in the paper when they first came out. Exactly when I don't remember; I don't know whether it is this year or less than a year ago.

Q. 8. When you first saw these cigarettes, or ads to which you refer, by whom did you think this product was made?

A. Well, my first impression was that they were made by the Beech-Nut Packing Company.

Q. 9. And do you know what led you to that belief?

A. Well, the fact was that the Beech-Nut people, as we always knew them, were in the jams, jellies and meat business, and then they went into the candy business. I thought they just added another line to their products and had gone into the tobacco business.

Q. 10. Can you tell me anything further about the impression you received when you first saw these Beech-Nut cigarettes, with respect to the Beech-Nut people or the rest of their line or anything of that character?

A. Well, knowing the Beech-Nut people as I knew them, and the quality they manufacture, from the line we handle in our own business, I was very much disappointed with the appearance of the package and the price of the cigarettes. I did not think that the quality and the appearance were in line with the general character of the quality of their products.

Q. 11. Do you now believe that these cigarettes were made by the Beech-Nut Packing Company?



A. Well, I did believe that until I found out otherwise upon making inquiry.

Q. 12. And do you remember, Mr. Aisenberg, how long after you first saw the ads or the cigarettes it was that you learnt upon inquiry that these cigarettes were not made by the Beech-Nut Packing Company?

A. Why, I believe it was over a month or so later that I happened to be in one of the tobacco stores and I asked various things, and amongst them I asked whether the Beech-Nut cigarette was being made, or being put out, by the Beech-Nut Packing Company and I was informed to the contrary.

Direct Examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 13. As I understand it, you were in the wholesale grocery business?

A. Yes.

X-Q. 14. You are the general manager and buyer?

A. Yes.

X-Q. 15. Do you buy tobacco products?

A. Why, yes.

X-Q. 16. Do you do the buying?

A. Yes.

X-Q. 17. From what concerns do you buy tobacco products?

A. We buy tobacco largely from H. E. Shaw Company, the Worcester Tobacco Company.

X-Q. 18. A jobber and distributor?

A. Jobber and distributor, as I understand it. It is the direct agent of the American Tobacco Company.

X-Q. 19. You do not buy direct from the American Tobacco Company?

A. No.

X-Q. 20. How many people are employed by your concern?

A. You mean salesmen?

X-Q. 21. Entirely.

A. I believe we employ about thirty.

X-Q. 22. Where is your business located?

A. 133-135 Grafton Street.

X-Q. 23. You employ about thirty people all told?

A. Yes.

X-Q. 24. In what region do you sell your products?

A. We ship as far as Maine; we ship New Hampshire, Rhode Island, Connecticut—of course, Massachusetts; we also make some shipments into New York State, and, occasionally, into Pennsylvania.

X-Q. 25. Do you do a general grocery business?

A. Yes.

X-Q. 26. Just name some of the brands of tobacco products your concern handles.

A. Why, we handle "Union"—in cigarettes, you mean?

X-Q. 27. Cigarettes and tobacco.

A. Camel, Helmar—the various brands we get orders for, we stock up as we get the orders.

X-Q. 28. Do you handle the Mogul?

A. We handle a small amount, not very many, unless we get a special order, a specially large order.

X-Q. 29. Do you handle Climax Plug?

A. No.

X-Q. 30. Do you handle any Beech-Nut tobacco?

A. We have, off and on. We handle the cigarette.

X-Q. 31. You do handle Beech-Nut cigarettes?

A. Occasionally we have had orders, and filled our orders.

X-Q. 32. Do you recall when you got your first order?

A. I can't tell.

X-Q. 33. Approximately.

A. I really couldn't tell. We have through a week about a thousand orders. I couldn't recall any particular order.

X-Q. 34. Was it about the time the cigarette first came along?

A. Some time after I first saw the ads in the paper.

X-Q. 35. When did you first see a package of Beech-Nut cigarettes?

A. Well, some time after I saw the ad. I have always been interested in advertising. I saw them, I believe, in a tobacco store—whether it was a month or a week later after I saw the ad I don't recall at this time.

X-Q. 36. When you first saw that package of cigarettes, did you examine them?

A. No, only on the face of it.

X-Q. 37. Are you familiar with the names of large tobacco concerns, manufacturing concerns?

A. Why, with some of them, yes.

X-Q. 38. Which ones do you know?

A. American Tobacco Company, Lorillard—those are the only two I recall.

X-Q. 39. You know A. J. Reynolds and Liggett & Myers?

A. Yes.

X-Q. 40. I show you a package of Beech-Nut cigarettes (similar to Beech-Nut Exhibit 1). Is that package the Beech-Nut cigarettes to which you refer as having thought they were put out by the Beech-Nut Packing Company?

A. Yes.

X-Q. 41. Whose name appears on that?

A. Now, as I recall, on the ads as they appeared

originally, I don't believe there was any name. On the ads I didn't see a name, or didn't notice a name.

X-Q. 42. I call your attention to an advertisement of Beech-Nut cigarettes appearing in the "Boston Herald" of today, August 18th, 1921. Is that similar to the advertisement you saw?

A. I don't recall.

(Page 1, Boston Herald, referred to marked for identification, Defendant's Cross Exhibit No. 5.

X-Q. 43. Was it like that advertisement?

A. I think it was a much larger ad I saw at the time.

X-Q. 44. Did it show the picture of the Beech-Nut cigarettes?

A. That I don't recall.

X-Q. 45. You don't know whether it had P. Lorillard's name on it?

A. I don't recall.

X-Q. 46. You find P. Lorillard's name on it now?

A. Yes.

X-Q. 47. You can't say that that advertisement you saw didn't have Lorillard's name on it?

A. Not at this time.

X-Q. 48. When did you first examine a package of those Beech-Nut cigarettes?

A. At the time I made the inquiry regarding the maker of the cigarettes or the manufacturer.

X-Q. 49. Then you examined them?

A. Then I looked at them, yes.

X-Q. 50. Whose name did you see?

A. I saw the name that appears on there. P. Lorillard.

X-Q. 51. You knew it was not the Beech-Nut Packing Company's cigarette?

A. Yes.

X-Q. 52. Up to that time you had not examined the package?

A. Up to that time I had not taken the trouble to, no.

X-Q. 53. Do you smoke cigarettes?

A. Why, I do smoke, but not what you call a very heavy smoker of cigarettes.

X-Q. 54. Have you smoked Beech-Nut cigarettes?

A. No, I haven't.

X-Q. 55. Well, then, you don't know anything about the quality of the Beech-Nut cigarette from personal experience?

A. No, not from personal experience.

X-Q. 56. You don't know anything about the tobacco or its blend?

A. No, nothing at all.

X-Q. 57. You are not really in a position to pass on its merits?

A. No, not on the merits, but my impression was conveyed by the general appearance of the package.

X-Q. 58. What do you mean by that?

A. Well, as I stated, previously always having the Beech-Nut concern in our mind, we handled their line in everything they put out, I felt the cigarette would be a much better one in appearance and perhaps a higher-priced cigarette than what it is.

X-Q. 59. You mean the appearance of the package?

A. Yes.

X-Q. 60. You mean it offended your artistic sense?

A. No, it isn't in line with the appearance of the Beech-Nut products.

X-Q. 61. Did you ever sell cigarettes?

A. I have been selling them right along.

X-Q. 62. Do you sell Beech-Nut products?

A. The full line, yes.

X-Q. 63. What does that line consist of?

A. Why, their line consists of jellies, jams, gum, glass—well, bacon glassed, dried beef and other odds and ends.

X-Q. 64. Food products?

A. Food products in general.

X-Q. 65. You never knew the Beech-Nut people to put out tobacco products?

A. I never have until I happened to see the ad.

X-Q. 66. That was the first time you thought they might have put them out?

A. That was my impression.

X-Q. 66a. But you didn't know?

A. I didn't know, no.

X-Q. 67. You never had anyone come into your place and ask you for a package of cigarettes made by the Beech-Nut Packing Company?

A. No, sir.

X-Q. 68. And if a person did ask you that question, if cigarettes were made by the Beech-Nut Packing Company, you would not sell them that package of cigarettes?

A. I would tell them it was not put up by the Beech-Nut people, after I got that information.

X-Q. 69. You would tell them it was P. Lorillard's cigarette?

A. If they asked me the question in the way you just put it.

X-Q. 70. If they asked you for cigarettes made by the Beech-Nut Packing Company you would not sell them that package?

A. No.

X-Q. 71. Because that name on there would indicate it as Lorillard's product?

A. Absolutely.

X-Q. 72. If a person came into your place of business and asked you for one of the many food products made by the Beech-Nut Packing Company, any one of them, you would not sell that person a package of these Lorillard "Beech-Nut" cigarettes?

A. No—as a food product?

X-Q. 73. As a food product.

A. No.

X-Q. 74. Suppose a man asked you for Beech-Nut gum, you would not sell him a package of Beech-Nut cigarettes?

A. Well, I would mention we had Beech-Nut cigarettes in stock, but not put up by the Beech-Nut Packing Company.

X-Q. 75. But suppose a man came into your place of business and said, I want a package of Beech-Nut chewing gum, you would think he was crazy if he took a package of Beech-Nut cigarettes in place of chewing gum?

A. In place of chewing gum?

X-Q. 75a. Yes.

A. Yes.

X-Q. 76. Are you a member of this firm you stated?

A. Yes, sir.

X-Q. 77. General manager?

A. And buyer.

Cross-Examination closed.

*Re-Direct Examination by Mr. Hinton.*

R-D. Q. 78. Mr. Aisenberg, in your direct examination you testified about Beech-Nut Exhibit 1, package of Beech-Nut cigarettes. In cross-examination you were shown and testified about another package of Beech-Nut cigarettes. What is the difference between these two packages?

A. Why, in the first place, one has tissue over it and in the second place I don't believe the blend of red on the one to your left is the same as the one to your right.

R-D. Q. 79. That is, as far as you can tell through the tissue paper?

A. Yes.

R-D. Q. 80. The one you were testifying about on direct examination is one with tissue paper on it?

A. Yes.

R-D. Q. 80a. And the one you were testifying about on cross-examination is the one without the tissue paper—is that correct?

A. Yes.

R-D. Q. 81. Mr. Aisenberg, if anybody came into your store and asked you for any single Beech-Nut package, such, for instance, as bacon, or jelly, some particular kind of glassed product or chewing gum, would you try to sell him or substitute on him any other Beech-Nut product than the one he asked for?

A. No. I don't believe I would. I don't believe if I tried, I could.

*Re-Cross-Examination by Mr. Cavanagh.*

R-X. Q. 82. As one that is familiar with tobacco and especially cigarettes as put on the market, is it customary, it is, isn't, Mr. Aisenberg, to place a tissue or glacé paper wrapper around the cigarettes to keep the air out?

A. Yes.

R-X. Q. 83. You have often seen it?

A. Many times.

R-X. Q. 84. If you wanted to purchase a package of Lorillard's cigarettes, you could read P. Lorillard's name on it?



A. I guess I could, if I was interested to find it.

R-X Q. 85. That is, if you wanted that brand?

A. Yes, if I bought a 7-20-4 I would see his name on it.

R-X Q. 86. You know it is customary to put that wrapper on the cigarettes?

A. Yes, but I believe I appreciate, and you do, that it is hard to find the name through tissue paper.

R-X Q. 87. And the same way with an Arrow Collar—you would see this name on it?

A. Yes. I just want to say this word for a matter of explanation. I don't consider myself an expert as a tobacco buyer because tobacco is one of our side lines. Our large and chief line is food products, groceries, and we handle tobacco because all grocers handle it and we like to give our grocers a complete line. I don't want to appear in the light of being an expert or big tobacco man. I am not. I want to say we buy from Worcester Tobacco Company, but also Henry Freeman in town; in case one is short, we naturally go to the other. We buy from both of these men and our profit on our merchandise is always as large as if we bought direct.

*Re-Re-Direct Examination by Mr. Hinton.*

R-D. Q. 88. Mr. Aisenberg, whom do you sell tobacco products to when you sell them?

A. Mostly grocery stores.

*Re-Re-Cross-Examination by Mr. Cavanagh.*

R-X Q. 89. Do you sell to tobacco stores, too?

A. Why, our percentage of sales to tobacco stores is very, very small.

R-X Q. 90. But you do sell to them?

A. Yes, we do, but we have about two thousand ac-

counts on our books and I don't believe a hundred of them would be and have been of the tobacco stores on our books, but they buy very little tobacco unless they should happen to run short on their regular jobber.

JOSEPH S. AISENBERG.

RALPH H. HORNE, a witness produced in behalf of the plaintiff, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Ralph H. Horne; 31; 11 Marsh Avenue, Worcester, Massachusetts; salesman for Beech-Nut Packing Company.

Q. 2. How long have you been working for the Beech-Nut Packing Company?

A. Three years and a half.

Q. 3. And what territories have you covered?

A. Eastern Massachusetts.

Q. 4. I show you a package of cigarettes which is in evidence in this case as "Beech-Nut Exhibit 1," these being "Beech-Nut" cigarettes. Have you ever seen this product before? If so, when and where did you first see it?

A. I saw them first in Worcester about the first of March, this year.

Q. 5. When these cigarettes first came out, state if you remember whether in the course of your work for Beech-Nut Packing Company you heard comments, remarks, inquiries, or the like, about the cigarettes?

A. Why, people have asked me if—how long we had been putting out cigarettes. Others have come up to my car—people that I knew—and asked for cigarettes.

Q. 6. How many times has that kind of thing happened?

A. Oh, I should say hundreds of times.

Q. 7. Can you tell me the names of any people who have made this kind of inquiry from you or made that kind of remark?

A. H. J. Kearns, Dr. F. C. Hayes, F. E. Lekberg, A. H. Powers, David Harrington, Francis M. Farrell, Warner Bottomly.

Q. 8. Have there been others besides these particular instances?

A. Why, yes, a number of others.

Q. 9. When was the last time that you heard this kind of a remark and what was the remark you heard?

A. This morning, I would say about ten o'clock. This Francis M. Farrell made the remark—I was talking about Beech-Nut cigarettes, and he stepped up and asked me this question, "Ain't you putting out the Beech-Nut cigarettes?"

Q. 10. Well, now, take, for instance—did you mention a man named Bottomly or something like that?

A. Yes, Warner Bottomly.

Q. 11. See if you can remember what he said.

A. He says, "I have been saving a package of Beech-Nut cigarettes. You expect us to smoke them," and, he says, "You can smoke them yourself."

Q. 12. How long ago was this?

Mr. Cavanagh: What was his answer?

A. He says, "I have been saving a package of Beech-Nut cigarettes—what there is left." He says, "You expect us to smoke them. You can smoke the rest of them yourself."

Q. 13. Can you recite any further instances of this character or any further remarks made to you about

Beech-Nut cigarettes? Be careful to state exactly what was said and nothing more.

A. This Kearns, H. J. Kearns, stepped up to me one day and says, "Give me a package of cigarettes." Dr. Hayes says, "How are the cigarettes going?" A. H. Powers says, "I see you are putting out cigarettes now." David Harrington, "How long have you been making cigarettes?" I told you about Farrell, didn't I?

Q. 14. Yes. And these instances you have referred to, have they been confined to Worcester or have they happened in other territory you have covered?

A. They have happened in all my territory.

Q. 15. Can you state an instance in some other town, for illustration?

A. Why, there is one in Fall River, Walker's Market, New Boston Road. I went into this store and saw his cigarettes and he asked me, "How Beech-Nut cigarettes were going?" I asked him that, and he said, "Not very good." He says, "I put them in knowing your other products were good."

Q. 16. When was this Fall River episode?

A. Last Tuesday, which would be August 16th.

(Direct examination closed.)

*Cross-Examination by Mr. Cavanagh.*

X-Q. 17. What did you say your connection with the Beech-Nut Packing Company is?

A. Salesman.

X-Q. 18. Mr. Horne, you have been assisting Mr. Hinton in collecting witnesses and evidence in this case, haven't you?

A. Yes.

X-Q. 19. You have been going around interviewing witnesses about this, and talking to them?

A. I haven't been talking. I?

X-Q. 20. Haven't you seen witnesses——?

A. Mr. Hinton did the talking.

X-Q. 21. You never went to see a witness by yourself?

A. Not any of the witnesses we had.

X-Q. 22. Did you see any probable witness by yourself?

A. What do you mean by a witness?

X-Q. 23. I mean this, by a "witness": As I understood, you have been assisting Mr. Hinton in collecting evidence?

A. Yes, sir.

X-Q. 24. That is being taken during this time?

A. Yes.

X-Q. 25. And by "this time," I mean the past few days or for the past few weeks. Your territory is here in Worcester?

A. Yes.

X-Q. 26. And you have been collecting witnesses?

A. Yes.

X-Q. 27. When did you first see Mr. Hinton about this matter?

A. Last Saturday.

X-Q. 28. After you saw Mr. Hinton, did you see any witness in connection with this matter or ask anybody to testify?

A. Of course I have talked with several. I haven't asked any of them to testify.

X-Q. 29. Have you gone around and talked to them?

A. Why, I have talked; I have talked to hundreds, not anything to do with witnesses.

X-Q. 30. That is what you have been doing during the last few days?

A. No, sir.

X-Q. 31. You haven't done any of that work since last Saturday?

A. Not to have any official witness at all.

X-Q. 32. What have you done in this connection?

A. Why, well, I guess I have talked with people and if they had anything to say I tried to remember it and jotted it down for my own convenience.

X-Q. 33. So you didn't talk to them about this case?

A. No, sir.

X-Q. 34. Well, didn't you go out of here this morning to try to get a witness?

A. To try to get a witness?

X-Q. 35. Yes.

A. Sure.

X-Q. 36. A witness that didn't appear on time, or something of that sort?

A. Well, I went out to get a man for Mr. Hinton.

X-Q. 37. You gave Mr. Hinton that man's name, didn't you?

A. You mean like this man that has come up here?

X-Q. 38. Yes. You told Mr. Hinton that man's name?

A. Yes.

X-Q. 39. You got that witness for Mr. Hinton?

A. Yes.

X-Q. 40. Do you sell any tobacco products for the Beech-Nut Packing Company?

A. No.

X-Q. 41. Do you ever sell any tobacco products for the Beech-Nut Packing Company?

A. No.

X-Q. 42. Do you know if they handle, or make, or sell tobacco products?

A. Not to my knowledge.

X-Q. 43. You say you talked to hundreds of people that have said they were under the impression that this Beech-Nut cigarette was put out by the Beech-Nut Packing Company?

A. Yes.

X-Q. 44. You haven't named hundreds of people here, have you?

A. No.

X-Q. 45. Do you recall who those hundreds of people were?

A. No, I can't. I can't give the definite number of people either.

X-Q. 46. Did you see any of these persons that you have named, such as Kearns and others, examine or handle a package of cigarettes like that which is here as "Beech-Nut Exhibit 1"?

A. Did I see them handle it, do you say?

X-Q. 47. Yes, and examine it.

A. No.

X-Q. 48. So you don't know whether they ever examined that package or not, do you?

A. Well, they would all—some of them had smoked it.

X-Q. 49. But you couldn't say they ever examined that package and read the matter on it?

A. No, I couldn't.

X-Q. 50. Do you use tobacco yourself?

A. Yes.

X-Q. 51. And you know, as far as the various brands go, that each man may have his own favorite brand and blend?

A. Yes.

X-Q. 52. Some men might prefer Camel or Fatimas?

A. Yes.

X-Q. 53. It is the same way with cigarettes?

A. Yes.

X-Q. 54. When the Beech-Nut Packing Company puts a new article of merchandise on the market, do you get notice of it?

A. Yes.

X-Q. 55. Just before it goes on the market—what is the procedure?

A. Why, we hear of it sometimes two or three months before it goes on.

X-Q. 56. Through the usual form, circular letters or instructions, or something of that sort?

A. Yes.

X-Q. 57. You never had any such instructions regarding any tobacco product from Beech-Nut Packing Company?

A. No.

X-Q. 58. Will you tell me whose name appears on this tobacco package?

A. P. Lorillard & Company.

X-Q. 59. The name of the Beech-Nut Packing Company does not appear on that package, does it?

A. No, sir.

X-Q. 60. And it is the practice for the Beech-Nut Packing Company to put its name on its packages of products, isn't it?

A. Why, naturally, the same as any other concern.

X-Q. 61. So that you know that isn't any product of the Beech-Nut Packing Company, don't you?

A. I know now.

X-Q. 62. With that name, "P. Lorillard Company," that indicates it is Lorillard's, to you?

A. It would, if I looked it over.

X-Q. 63. The minute you examine it you would know that?

A. If I looked for it.

X-Q. 64. Did you ever know of any person to go into a store and ask to purchase a package of Beech-Nut cigarettes made and put out by the Beech-Nut Packing Company, and to be handed or palmed a package of P. Lorillard cigarettes?



A. No.

X-Q. 65. Well, if you went into a store yourself and asked for a package of Beech-Nut chewing gum of the Beech-Nut Packing Company, could you be deceived or confused into accepting a package of Beech-Nut cigarettes for chewing gum?

A. No.

X-Q. 66. And you don't know of any person who was so deceived, do you?

A. No.

X-Q. 67. You never sold tobacco yourself?

A. No.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 68. Mr. Horne, you have been asked by Mr. Cavanagh about going for Mr. Aisenberg immediately before you testified. Do you know what happened in connection with Mr. Aisenberg, and why you had to go for him?

A. It was because I knew him; so I could get him up here quicker, to save time, as I thought he was going to Boston on the 2 o'clock train.

Mr. Hinton: That is all.

No recross-examination.

RALPH H. HORNE.

DORACE L. BOTTOMLY, a witness produced in behalf of the plaintiff, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Dorace L. Bottomly; 6 Fridel street, Worcester; grocery clerk.

Q. 2. In the grocery store in which you work, have you handled any of the products of the Beech-Nut Packing Company?

A. Yes.

Q. 3. And how long, as far as you know, have you handled those products?

A. Why, off and on for a number of years, quite a number of years.

Q. 4. I show you a package of cigarettes which is in evidence in this case as "Beech-Nut Exhibit 1." Have you ever seen these cigarettes before?

A. I have.

Q. 5. If so, when and where did you first see them?

A. Well, my brother bought a package, the first time I saw them; I saw them possibly before that on the cigar stands.

Q. 6. About when was this?

A. Why, this spring; this last spring.

Q. 7. You have said that your brother bought a package of these cigarettes. Did you smoke any of those cigarettes?

A. I did.

Q. 8. Did you take them out of the package your brother had?

A. Yes, I did.

Q. 9. At that time, by whom did you believe this product was made?

A. Why, I thought it was the Beech-Nut Packing Company.

Q. 10. Do you know why you believed that?

A. Why, I thought I recognized the label on there.

Q. 11. How long did you continue to believe that these cigarettes were made by the Beech-Nut Packing Company?

A. Until I met Mr. Horne, the agent, one night.

Q. 12. Who is Mr. Horne?

A. The representative or agent, salesman, for Beech-Nut Packing Company.

Q. 13. Yes, and then what happened?

A. I asked him if he ever tried one of the cigarettes—something like that. He laughed. And finally it come about I asked him if he made these cigarettes. He replied, No, his firm didn't make them.

Q. 14. Have you a brother?

A. Yes.

Q. 15. What is his name?

A. Warner; J. Warner.

Q. 16. J. Warner Bottomly?

A. J. Warner Bottomly.

Q. 17. Is he acquainted with Mr. Horne, do you know?

A. Yes, he is.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 18. Mr. Bottomly, what concern are you employed by?

A. Maywood Market.

X-Q. 19. What is their line of business?

A. Grocery and meats.

X-Q. 20. Wholesale or retail?

A. Retail.

X-Q. 21. Do they sell tobacco products?

A. No.

X-Q. 22. So you do not sell tobacco products?

A. Never sold them.

X-Q. 23. Did you purchase any of these Beech-Nut cigarettes yourself?

A. No, I didn't.

X-Q. 24. You have never gone into a store and asked for Beech-Nut cigarettes?

A. I never have.

X-Q. 25. Did you handle the package your brother had?

A. I did.

X-Q. 26. Did you take the trouble to examine it?

A. Not closely, no.

X-Q. 27. Didn't read anything on it at all, did you?

A. No, I didn't. I saw there was the Beech-Nut label on there.

X-Q. 28. You mean, you saw they were Beech-Nut cigarettes?

A. Yes, I saw they were "Beech-Nut" cigarettes.

X-Q. 29. Is that what you mean by the Beech-Nut label?

A. Yes.

X-Q. 30. Just that name "Beech-Nut"?

A. "Beech-Nut."

X-Q. 31. Will you look at that package now, and tell me whose name is on it?

A. Why, Beech-Nut.

X-Q. 32. I call your attention to Plaintiff's Exhibit 1.

A. "Beech-Nut."

X-Q. 33. What wording on that package would you take to indicate the party making or putting out that cigarette?

A. "Beech-Nut."

X-Q. 34. What does this mean (indicating)? Can you read?

A. I can read it, yes.

X-Q. 35. Read it, then.

A. Lorillard Company.

X-Q. 36. Did you ever hear of the Lorillard Company?

A. I never did.

X-Q. 37. You don't chew tobacco?

A. No.

X-Q. 38. Smoke cigarettes?

A. No.

X-Q. 39. Did you ever smoke Moguls?

A. No.

X-Q. 40. Or Egyptian Deities?

A. No.

X-Q. 41. Murad?

A. No.

X-Q. 42. Helmar?

A. I believe I have.

X-Q. 43. You are really not familiar with the makes of cigarettes?

A. I have an idea of who they are made by.

X-Q. 44. Do you know Beech-Nut Packing Company's name appears on its goods?

A. I believe it does.

X-Q. 45. But you don't know, do you? Do you know if Beech-Nut Packing Company puts out any other brands of goods other than under the name "Beech-Nut"?

A. I don't know.

X-Q. 46. You never heard of "Mohawk" brand?

A. No.

X-Q. 47. Or "Erie" brand?

A. No.

X-Q. 48. If you went into a store and wanted to buy some Beech-Nut chewing gum—by that I mean the products of the Beech-Nut Packing Company—could you be confused or deceived into taking a package of these Lorillard "Beech-Nut" cigarettes in place of the article you wanted?

A. Not if I asked for Beech-Nut cigarettes.

(Question read.)

A. Well, as I take it, Beech-Nut don't make cigarettes. How could I be confused on Beech-Nut cigarettes?

X-Q. 49. Well, I will put the question this way specifically, so you will understand me. If you went into a store, and we will say, for example, a retail store, and asked for a package of Beech-Nut chewing gum made by Beech-Nut Packing Company, could the clerk fool you or deceive you into taking a package of these cigarettes in place of the *gum*?

A. No, not if I wanted gum. I would know what it was.

X-Q. 50. That is it. So you would never mix cigarettes with *gum*?

A. No.

DORACE L. BOTTOMLY.

JOHN H. LANG, a witness produced in behalf of the plaintiff, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. John H. Lang; 41; 44 William street, Worcester; wholesale grocer.

Q. 2. With what firm are you connected?

A. C. A. King Company.

Q. 3. Do they do business in the wholesale grocery line in Worcester?

A. Yes.

Q. 4. Does your firm handle tobacco products for the grocery trade?

A. Yes, sir.

Q. 5. I show you a package of cigarettes, which is in evidence in this case as "Beech-Nut Exhibit 1." Have you ever seen cigarettes like these before; if so, when, if you can remember, did you first see them?

A. That brand?

Q. 6. Yes.

A. Well, I first saw it in a newspaper advertisement.

Q. 7. Did you subsequently see the cigarettes themselves?

A. Yes, sir.

Q. 8. When you first saw the advertisement to which you have referred, by whom did you think this product "Beech-Nut" was made?

A. Well, I read it at home, and I said to Mrs. Lang, "What in the dickens do the Beech-Nut people want to come out with a cigarette for?"

Q. 9. What made you think this product was the product of the Beech-Nut Packing Company?

A. Why, naturally, being a wholesale grocer, we think of the brand "Beech-Nut" as applied to the meat people, and my thought was "what do the meat people want to get into the cigarette game for?"

Q. 10. Will you state how long you continued to believe the Beech-Nut cigarettes were product of the Beech-Nut Packing Company?

A. Oh, it probably run along—why it must have run along for a month or six weeks.

Q. 11. And then did you find out the Beech-Nut Packing Company had nothing to do with these cigarettes?

A. One day at the office, when the specialty man was there, the subject came up and I guess I asked him the question: "What the Beech-Nut people wanted to go into this game for?" and he said, "That isn't a Beech-Nut product at all, that it was being made by a tobacco house." Then I remember of saying, "How the dickens—I might have made it a stronger term than that—can a tobacco house get away with it?"—that was my first thought, how can a tobacco house get away with it, how can they get away with a Beech-Nut brand of cigarettes? I was quite surprised, as I say, because my thought was I realized that when the Beech-Nut Packing people was

putting out a cigarette I thought immediately, it is pulling down the high prestige they have had as a meat house; my thought was, it wasn't a good thing.

Q. 12. I would like to have your whole thought, if you have something further to say.

A. My thought was, they have built a high prestige in the meat line of packing, and if they had got to resort to a cigarette it seemed to me it was pulling down that prestige they had been working on for years. That was why I was surprised the Beech-Nut people had come out with a cigarette.

Q. 13. Did you ever hear of a Beech-Nut chewing tobacco or scrap tobacco?

A. No.

Q. 14. It is not sold in this territory?

A. No, sir.

Q. 15. Will you tell me, if you know, whether scrap chewing tobacco sells through this territory?

A. I never heard the term "scrap tobacco."

Q. 16. Do I understand you have sold tobacco products through your house to your grocery trade?

A. Yes.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 17. Mr. Lang, do you personally sell tobacco?

A. The C. A. King Company, and our salesmen, and I being one of the salesmen, we sell tobacco.

X-Q. 18. Have you personally sold tobacco?

A. Yes.

X-Q. 19. What brands?

A. Why, all the local, popular brands of tobacco and cigarettes.

X-Q. 20. What are those?

A. "Just Suits," Mayo's, that is—(I have a whole



page of them in the cost book)—all the popular cut plugs, Prince Albert—I don't use tobacco myself; there is a new one that has come out in a cigarette, 1-11, Meccas, Helmars, Perfections, Eglantin, Planet, and, oh, probably half a dozen different cigars. We buy quite a little direct and quite a lot through Shaw. The tobacco account has been one that we handle more for accommodation to our outlying customers than because there is any real benefit to King & Company. In other words, the profit isn't enough to make us interested in it particularly, although we sell thousands of dollars worth through the year.

X-Q. 21. Do you consider it a different line from the grocery business—from food products?

A. No, sir; we would like, and would welcome, a big tobacco business if we could see that it was helping us financially. We talked with a wholesaler in this state some time ago, knowing that he had developed a million-dollar business a year, and we found he was doing it on so close a margin experts had told him who had made a study of profits in the wholesale grocery line, that he was losing money, even though he was doing a million-dollar-a-year business, and apparently was not increasing his overhead by so selling that line.

X-Q. 22. You mean that the tobacco business has gained, in itself?

A. I mean that we cannot see where there is a profit large enough to interest us in it particularly.

X-Q. 23. Yes. Outside of the question of profit, you would never mix food products with tobacco; you would not sell one for the other, would you?

A. I don't just get you.

X-Q. 24. I mean this: If a person came into your store, for example, and wanted to buy, say, 1000 Beech-Nut hams and 1000 jars of preserves, or a thousand packages of Beech-Nut chewing gum, all being the product of

the Beech-Nut Packing Company, you would not fill that person's order by sending him a carton of Beech-Nut cigarettes like this; would you substitute the cigarettes for the food product?

A. Why, that would be what we call a shipping error, to send something different than what he ordered.

X-Q. 25. You would not do it?

A. No, sir.

X-Q. 26. Do you know the names of any prominent tobacco manufacturers?

A. No, I don't.

X-Q. 27. You have never paid enough attention to tobacco for this purpose?

A. No, I haven't. It has often come up in the office that we could buy these many different things that we sell in the tobacco line, we could buy them as cheaply of Shaw as we could direct of the tobacco people, and I only think of the tobacco people as some organization, some big trust or a combination of trusts that control that whole sweep of the tobacco industry, and so we trade more locally, with Shaw, and buy very little direct.

X-Q. 28. You don't enter the tobacco field at all?

A. No, sir. There is a man that comes in who deals in some of the plugs, and I suppose he represents a big tobacco concern, but if I was to give my stenographer an order for some tobacco direct, I wouldn't know where to mail the order. I haven't taken any interest in it.

X-Q. 29. You have never examined carefully tobacco packages, have you?

A. Only as I would glance at them as one would get the first impression.

X-Q. 30. As I understand it, you never carefully examined that package?

A. Only as I saw it advertised in the paper.

X-Q. 31. I call your attention to an advertisement ap-

pearing on page one of the Boston Herald of August 18th, 1921, today, and which page has been marked for identification as Defendant's Cross-Exhibit No. 5, and direct your particular attention to an advertisement of Beech-Nut cigarettes. Could you tell me what name is shown on that *fac-simile* of the package?

A. It is P. Lorillard Company.

X-Q. 32. You do not find the words "Beech-Nut Packing Company" anywheres on that advertisement?

A. No, sir.

X-Q. 33. Is that the same, or similar to the advertisement you saw in the paper?

A. I should say it was identical.

X-Q. 34. So you did not read the advertisement very carefully, to see if the Beech-Nut name was on it, or Lorillard's name?

A. The thing that impressed me the first time I saw it was the name "Beech-Nut," and what seemed to clinch my thought it must be a Beech-Nut product was the similarity in the trade-mark below "Beech-Nut." I always think of the Beech-Nut products as having a picture of the two half or two whole beech-nuts present; that, having the same, I had no thought that it could be other than the Beech-Nut product. I didn't go below the trade-mark. I didn't go below this circle here.

X-Q. 35. So you didn't examine it carefully at all?

A. I remember at the time this traveling man told me it wasn't a Beech-Nut product. I says, "For Heaven's sake," I says, "they have got the Beech-Nut picture, the same as Beech-Nut has for theirs."

X-Q. 36. What do you mean by the picture?

A. This, here (indicating)—these two—I don't know whether that is two halves of a beech-nut or whether it represents two beech-nuts together. I always think of the Beech-Nut trade-mark as having the beech-nut pictured under their Beech-Nut brand.

X-Q. 37. You say that label is identical with the Beech-Nut label?

A. I say that was my thought when I first saw it.

X-Q. 38. I show you a representation of the Beech-Nut Packing Company label, which is in this case, which has been marked for identification in this case as Defendant's Cross-Exhibit No. 3. Is that Beech-Nut picture (indicating) like that one in the advertisement?

A. No.

X-Q. 39. Why isn't it like it to you?

A. It is not just like it.

X-Q. 40. Well, it isn't like it, is it?

By Mr. Hinton: The witness has answered the question.

A. Well, it isn't like it, no.

X-Q. 41. I presume you have handled a great many varieties of package goods, such as food products and the like, haven't you?

A. Yes, sir.

X-Q. 42. And of course you have observed a great many instances where these various food products have as a part of their label an oval, haven't you?

A. Yes.

X-Q. 43. That is quite common?

A. Yes, sir.

X-Q. 44. Isn't it?

A. Yes, sir.

X-Q. 45. As I understand it, you never purchased a package of Beech-Nut cigarettes at all?

A. No, sir.

X-Q. 46. And you never examined them until today, did you?

A. Well, I haven't today, only as you have shown me the package of them.

X-Q. 47. I mean, this is the first time you saw a package of Beech-Nut cigarettes?

A. Yes.

X-Q. 48. So you never really made an examination, to decide whether it was a Beech-Nut Packing Company cigarette or P. Lorillard's cigarettes?

A. No, sir.

X-Q. 49. So, as far as you know, no person has ever come into your place of business, or any other place of business, and asked for Beech-Nut Packing Company cigarettes?

A. No, sir, not into our place; we don't sell Beech-Nut cigarettes.

X-Q. 50. Now, I understand you do not handle the Beech-Nut cigarette at all?

A. Not to my knowledge, unless it might be on some special order that might have come in and our head office man may have called up Shaw for a carton; there are a great many times through the month that from our outlying customers through the country districts we get certain things in the tobacco line for, as an accommodation. There are a number of brands that I go through and that I check from day to day that I am not even familiar with the prices of.

X-Q. 51. Well, personally you have never sold a package of Beech-Nut cigarettes?

A. Personally I don't remember of Beech-Nut cigarettes going through our house.

X-Q. 52. And personally you have never sold a package, have you?

A. No.

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 53. You testified on cross-examination about a certain comparison between the beech-nut on the Beech-Nut cigarette package and the beech-nut on the Beech-Nut Packing Company label. State whether or not when you were being asked about those two beech-nuts you had them both before you side by side, and were comparing the two. Do you understand the question?

A. I don't think I get you.

R-D. Q. 54. All I want to get at is this: Were you comparing the two that way (lying side by side), or comparing the appearance of the two, one with the other, or testifying from recollection, or both of them? If you don't understand the question, let me make it plain to you before you answer it.

A. I can tell you my impression when I first saw the ad in the paper, and I can now give you my impression as I compared them side by side, if that is what you want.

R-D. Q. 55. On direct examination you gave us your impression as you saw the ad in the paper. On cross-examination you were shown this Beech-Nut Packing Company label and the "Beech-Nut" label on the cigarettes and asked whether the two pictures of the beech-nuts were the same. When you answered those questions were you comparing these two pictures with each other, or were you testifying from recollection?

A. Well, I was testifying, comparing the two; comparing the two. My recollection as I saw it in the paper was they were much more similar than they appear to be now side by side under direct examination.

Redirect examination closed.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 56. They look different to you when you compare them now, don't they?

A. They look different to me, surely.

JOHN H. LANG.

ALVAH L. CONANT, a witness produced in behalf of the plaintiff, first being duly sworn, notice of production of the said witness being waived, in answer to interrogatories propounded by *Mr. Hinton*, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Alvah L. Conant, 30 Hartshorn Avenue, Worcester; thirty-seven; salesman.

Q. 2. Mr. Conant, have you used Beech-Nut Packing Company products in your home? If so, how long have you used them, do you remember?

A. Oh, five years, roughly, jellies.

Q. 3. And nothing else other than Beech-Nut jellies?

A. We used the full line.

Q. 4. Prior to the early Spring of this year, tell me what you thought of Beech-Nut Packing Company and their products?

A. I looked upon them as one of the representative houses in the States, thoroughly reliable, and was proud to be a consumer of theirs, a family consumer.

Q. 5. I show you a package of cigarettes, which is in evidence in this case as "Beech-Nut Exhibit 1." Have you ever seen these cigarettes before, or an advertisement of these cigarettes? If so, tell us, please, when you first saw this?

A. I was first attracted to the fact they might be making a cigarette when my boy called my attention to

an unusual billboard on the road while I was touring with my family.

Q. 6. When was this, do you remember?

A. It was the first thirty days of their campaign.

Q. 7. Was this in 1921, should you say?

A. Well, it was if it wasn't the last part of 1920. I cannot tell you that right offhand, sir.

Q. 8. When you first saw that large billboard ad, by whom did you believe those cigarettes were made?

A. Beech-Nut Products Company, sir, decidedly.

Q. 9. Will you state, Mr. Conant, why if you know when you saw that advertisement you believed this was the product of Beech-Nut Packing Company?

A. Well, because I have a great respect for the trade name "Beech-Nut," and my two kiddies being consumers of the product, I was forcibly impressed and instantly impressed with the fact that it seemed to be unusual to blend purity with impurity, if you know what I mean—(you will have to accept me as I am). I thought that with the line they were producing, that with a thorough corps of salesmen, they would have all they could do to produce what could be consumed without having an intelligent corps of salesmen explain why there had to be a side line or blending of anything that was forcibly contrasted to me as those two products to manufacture.

Q. 10. Can you state what the effect was on you, on your personal attitude to the Beech-Nut Packing Company, when, as you have stated, you saw these cigarettes or an advertisement thereof and believed they were made by the Beech-Nut Packing Company?

A. My estimation of them as manufacturers was decidedly altered.

Q. 11. What if any decision did you make about the purchase of their products?



A. Why, I immediately made the decision to learn of a manufacturer of pure food products solely, to see that my friends and myself purchased our requirements from them, and I told all my friends and my folks they ought not to purchase from a firm that was becoming what it was evident to me the Beech-Nut Products Company were becoming.

Q. 12. Did you confine this opinion and change of good will about the Beech-Nut Packing Company to yourself, or did you mention the matter to others?

Mr. Cavanagh: The question is objected to. There has been no testimony given to indicate any change of good will; the questions calls for a conclusion of the witness.

Mr. Hinton: What the witness has said certainly does indicate a change of good will.

(Question read.)

A. I did decidedly mention it to my business friends and social friends.

Q. 13. And what did you tell your business friends, do you remember?

A. Why, being a one-line man myself, I decided any product that came into my home must be one-line products, and that I felt, as I said before, that we should stand by a manufacturer who was consistent with his declarations and advertisements as to purity and that sort of thing—perhaps you won't understand my wording in there—and that just as soon as I found a house I could sincerely recommend I would advise them of it. And this I did, too.

Q. 14. Will you state again, so that I may clearly understand you, what recommendation if any you made to your friends about this proposition?

A. Yes, I recommended the "Burlington Jelly House."

Q. 15. Now, you mean instead of Beech-Nut Packing Company?

A. Yes. Yes, I did. A Mrs. Jenkins, a concern known as Mrs. Jenkins' Jellies.

Q. 16. How long did you continue to tell your friends, advise your friends, to buy the products of another house than the Beech-Nut Packing Company?

A. Oh, I would say—as I told you this morning, there was about three or four or five weeks, say a month, offhand.

Q. 17. Did you subsequently stop telling your friends or recommending to your friends to buy other products in place of the Beech-Nut products?

A. Well, decidedly; but it is a question as to how far I might have gone where I could correct a wrongful opinion, that is, not a wrongful opinion—it is a question of how far I might have gone to where it was impossible to correct a natural decision—I had a thought. I don't know whether I have put it on paper. I know what I mean.

Q. 18. Mr. Conant, what was it which caused you to stop recommending other products in place of the Beech-Nut products and again recommend Beech-Nut products?

A. A clear explanation on the part of the Beech-Nut Products Company's representative, Mr. Ralph Horne, led me to believe I would be decidedly loyal to Beech-Nut.

Q. 19. What did he tell you?

A. There wasn't any connection between the cigarette manufacturers and the manufacturers of his products, of his company.

Q. 20. You have testified that when you first saw the sign, you believed the cigarettes were made by the Beech-Nut Packing Company; that you thereafter

not only yourself decided not to purchase further Beech-Nut Packing Company products, but so recommended to your friends; that subsequently you were advised by the Beech-Nut man here that the Beech-Nut Packing Company did not make the cigarettes and again became loyal to the Beech-Nut Packing Company. I would like to have you tell me in a little more detail, if you can remember, just what you said to your friends and business acquaintances during the time you were recommending people to buy other products rather than Beech-Nut Packing Company products.

A. Well, I imagine the three of you gentlemen are cigarette users here. I am very antagonistic to cigarettes, you know. I decide very quickly, and I just decided there wasn't anything coming into my home for the kiddies in the way of a mixed line of manufacturer's products. That was all. I decide things quickly, and that was decided inside of thirty seconds. I wouldn't any more think of mixing high-grade jellies and cigarettes than I would of race horses and fast launches. I don't think there should be any connection and was very much astonished to have this billboard proclaiming to me the Beech-Nut Packing Company, I believed, in marketing their stock and my being personally solicited, that they should want additional funds to venture into any such, to my mind, unwise step.

Q. 21. Can you remember what it was that you said to your friends about this business at the time you were recommending people against buying Beech-Nut products—what argument did you give them?

A. It would be quite difficult to go over my quickly concocted selling explanation, either whether I was receiving remuneration for it or whether I was recommending courteously or hammering discourteously a line I wanted my business friends and social friends

to be aware of, or to be aware of from a point of letting them alone. It would require so much energy, and not being willing to expend the energy, I don't see how I could tell you except with each individual being reviewed, really. I emphasized the fact that it was unwise for a house of that sort that I thought Beech-Nut products was, to be making a tobacco product and that I was disappointed and that I thought any high-grade manufacturers of jellies, who was having their profit solely from that source, should benefit by what little business we had to give them.

(Direct examination closed.)

*Cross-Examination by Mr. Cavanagh.*

X-Q. 22. Mr. Conant, what line of goods do you sell? You say you are a salesman?

A. Cleaning products; chemicals and cleaning products.

X-Q. 23. You don't sell any grocery lines?

A. No, I don't.

X-Q. 24. Did you ever sell any food products?

A. No, sir, not for a remuneration to myself.

X-Q. 25. I mean, in your business?

A. Not as having held a position; no, sir.

X-Q. 26. You were speaking a while ago of certain billboard that you saw. Where was this billboard?

A. I would say between here and Fitchburg.

X-Q. 27. Fitchburg, Massachusetts?

A. Yes.

X-Q. 28. Were you riding past the billboard in a car?

A. Yes, I was.

X-Q. 29. You didn't stop and go up and examine that billboard?

A. I slowed down to be courteous to my boy's ob-

servation in this particular matter. I pulled my throttle right down.

X-Q. 30. Will you please describe that advertisement to me in detail, what it showed?

A. Oh, in pulling down from thirty-five or forty to twenty-five or thirty, I remember seeing the word "Beech-Nut" and that was sufficient for me to see, as descriptive of that product.

X-Q. 31. How did you know it related to tobacco?

A. I know it said "Cigarettes" on the billboard.

X-Q. 32. Did it have a package of cigarettes on it?

A. That I don't recall. I recall the "Beech-Nut" and the "Cigarettes."

X-Q. 33. Did it have the name of Beech-Nut Packing Company on it?

A. That I don't recall. I would say from what I know now that it did not.

X-Q. 34. It did have the name P. Lorillard Company on it?

A. That I don't know, sir. I repeat, it seemed to be for me sufficient to see the words "Beech-Nut" and "Cigarettes" on it.

X-Q. 35. You just glanced at it and then went by, as you rode along in your car?

A. And emphatically formed my conclusions. I did not glance at it and then drop the topic, because I was forcibly impressed, personally.

X-Q. 36. But you did not stop your car and examine it?

A. You would not be supposed to do that in connection with billboard advertising.

X-Q. 37. How long have you known this Mr. Horne?

A. Five years, I would say.

X-Q. 38. How long have you known Mr. Horne to represent the Beech-Nut Packing Company?

A. You are testing me forcibly now, but just give me a second—three years, sir, roughly.

X-Q. 39. Did you ever buy any Beech-Nut products from Mr. Horne?

A. Quantities of them, yes, sir.

X-Q. 40. How long a period of time?

A. On and off, for three years, sir.

X-Q. 41. At how frequent intervals?

A. Sixty to ninety days, through those years.

X-Q. 42. And Mr. Horne lives in town, doesn't he?

A. Yes, he does.

X-Q. 43. Do you know where the Beech-Nut Packing Company is located?

A. Yes, I remember of Mr. Horne telling me he went to a conference there, that was the only way I knew that. It is an Indian name.

X-Q. 44. Canajoharie, New York?

A. Yes, that is it.

X-Q. 45. You knew they were up there?

A. Yes.

X-Q. 46. And you have been buying goods from Mr. Horne for three years?

A. Yes.

X-Q. 47. And you rode by a sign in Fitchburg, without stopping to look at it, and you came to the conclusion that the Beech-Nut Packing Company was putting out cigarettes—is that right?

A. Decidedly, yes.

X-Q. 48. Are you antagonistic to tobacco? You are, aren't you?

A. Yes, I am.

X-Q. 49. You don't use cigarettes, do you?

A. No.

X-Q. 50. Or chew tobacco?

A. No.

X-Q. 51. Or smoke?

A. I don't smoke at all.

X-Q. 52. And, being antagonistic to tobacco and all its works, as I understand it, you rode by a sign along side the road and you just gave a glance at it——?

A. No.

X-Q. 53. ——or looked at it?

A. No; I read it sufficiently to know the words "Beech-Nut" and the word "Cigarettes" were on there.

X-Q. 54. I want to get this clear. Whether you read it sufficiently to know whether Beech-Nut Packing Company's name was on it or not, or whether P. Lorillard's name was on it or not, as you have testified that on the strength of that fleeting impression, do you mean to tell me you came back to this town and not only ceased your trading with a reputable concern like Beech-Nut Packing Company, but that you deliberately went around and spread the report amongst other people, that these people were engaged in selling cigarettes?

A. Not on that conclusion alone.

X-Q. 55. You did that?

A. Pardon me, not on that conclusion alone.

X-Q. 56. But you spread the report amongst these people, your friends, that these people were selling cigarettes and you recommended another house to them?

A. I would decidedly do that, with a firm that was manufacturing cigarettes in a case like this.

X-Q. 57. You have stated you did recommend them to other houses to deal with?

A. Decidedly.

X-Q. 58. And Mr. Horne was representing Beech-Nut Packing Company?

A. Yes.

X-Q. 59. And knew where the Beech-Nut Packing Company was located?

A. Yes.

X-Q. 60. And, instead of calling up Mr. Horne and asking him if they were putting out cigarettes, or instead of using a two-cent stamp and writing to the Beech-Nut Packing Company, you turned around and without any definite evidence as to whether or not they were putting out cigarettes, you went around individually and caused a loss of trade amongst the customers of a reputable concern?

A. I had those reasons for my concluding it was a Beech-Nut product.

X-Q. 61. If you had written to Canajoharie when you got home from the automobile trip, you would have found out, wouldn't you?

A. As a consumer of theirs, I am not obliged to.

X-Q. 62. But, not knowing whether they were putting out cigarettes or not, you convicted them of putting out that cigarette?

A. I convicted them, because unfortunately, being a representative myself, I would say that led the general public to conclude that was the fact, sir.

X-Q. 63. But you didn't ask Mr. Horne was it a fact?

A. Yes, I did.

X-Q. 64. Immediately?

A. As soon as I saw him.

X-Q. 65. Immediately?

A. No, I don't think so.

X-Q. 66. You knew where Mr. Horne was?

A. Yes.

X-Q. 67. And you knew where the Beech-Nut Packing Company was?

A. Yes.

X-Q. 68. If you thought a man was doing a wrong

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A. I had no reason to believe they were doing other than what appeared on that billboard, sir.



X-Q. 69. You did not know it was the Beech-Nut Packing Company?

A. I concluded it was. It wasn't put there for me to take the trouble to stop and look. I simply saw "Beech-Nut Cigarettes," and concluded, as did my eight-year-old boy, that it was a Beech-Nut product——

X-Q. 70. So, on the opinion of an eight-year-old boy you convicted the Beech-Nut Packing Company was putting out this cigarette, did you?

Mr. Hinton: He has testified that other people had spoken about it.

Mr. Cavanagh: Let him finish.

Mr. Hinton: He was not taking a mere word of an eight-year-old boy.

Mr. Cavanagh: Mr. Hinton is not asked to testify in this case. Mr. Cavanagh is cross-examining the witness and will continue it. If Mr. Hinton has any legal objection, he should state it.

X-Q. 71. Let us go back. You didn't write to the Beech-Nut Packing Company at Canajoharie and ask them if they were putting out cigarettes?

A. I don't know as I was obliged to—I think I should have to object to the way you put that, but but being a consumer of theirs I don't know of any reason why I should write.

X-Q. 72. You did not write to them and ask if they were putting out the Beech-Nut cigarettes?

A. Not being a consumer of cigarettes there would be no reason why I should do that. I was using their jellies, etc.

X-Q. 73. You immediately, after seeing that sign, went around amongst your acquaintances and friends and told them they should not buy the Beech-Nut products but recommended others, and because you happened to be antagonistic to tobacco——

A. Not necessarily that, but because of the disappointment of having that impression made on me. Impressions come to me quickly.

X-Q. 74. Don't you think it would be fair to have found out whether or not the Beech-Nut Packing Company was putting out Beech-Nut cigarettes before you went to such extremes as to go around amongst your friends, neighbors and acquaintances and ask them to stop buying Beech-Nut Packing Company's goods and recommend to them a competitor's goods?

A. Not in connection with the weighty matter this has turned out to be. I find in my connection with it that others were so impressed.

X-Q. 75. So you believe in convicting them of putting out the Beech-Nut cigarettes before you knew anything about it?

A. Through no fault of their own, decidedly yes.

X-Q. 76. That is all on that point. You say you never bought a package of Beech-Nut cigarettes?

A. No, sir.

X-Q. 77. Will you tell what name is on this package of Beech-Nut cigarettes which I show you?

A. Lorillard's.

X-Q. 78. Read the name, please.

A. P. Lorillard & Co. I have sold thousands of dollars of their goods.

X-Q. 79. You have sold thousands of dollars' worth of their goods?

A. Yes.

X-Q. 80. It is a reputable house in its line, isn't it?

A. Now that I know them, as I have—right now is the first time I knew Lorillard was putting out the Beech-Nut cigarettes, and they have lowered their standing very, very decidedly, sir, with me.

X-Q. 81. What line of business is P. Lorillard & Co. in?

A. High-grade tobaccoists.

X-Q. 82. You have sold their goods?

A. Yes.

X-Q. 83. And you didn't take the trouble, before you spread the report that the Beech-Nut Packing Company was putting out a cigarette, you didn't even take the trouble to buy a package and look and see whose name is on it and write to the Lorillard Company to find out?

A. I ask you why I should buy a package of cigarettes?

X-Q. 84. If you thought so much of the Beech-Nut products, like you have led me to believe, and before you would go around and damage a reputation, I should think you might have paid fifteen cents to find out what it would be and look at the package—wouldn't you do that?

A. Not being a buyer in other lines, I would not take the trouble to look at the house putting it out.

X-Q. 85. Couldn't you go to a cigar store and look at a package?

A. No. It would be sufficient for me to have them put out by the Beech-Nut people, to put "Beech-Nut" on their product.

X-Q. 86. Do you realize that it is dangerous business to go about and damage a firm's reputation on so slight evidence as that?

A. I decidedly contradict that, when I say in being a consistent user of the Beech-Nut products, and seeing that sign, I could form my own conclusions as to their making a cigarette, and speak of it as tactfully as I could.

X-Q. 87. Don't you think it would lead to a suit for slander, libel on the case?

A. No, sir. No.

X-Q. 88. Do you find the name Beech-Nut Packing Company on that package any place? Examine it.

A. It is sufficient to me, I tell you again, to see the word "Beech-Nut" on it.

X-Q. 89. I ask you, do you find the name Beech-Nut Packing Company on that package any place? Examine it, please.

A. No, sir. I answer, no, sir.

X-Q. 90. So that you now know that the package of the P. Lorillard Tobacco Company?

A. Why, I don't know that it is.

X-Q. 91. Would the name on there lead you to believe that?

A. Oh, from what I know now I wouldn't question that. But I know this—and I want to say what I think—I think the Beech-Nut Company has a very high-grade clientele in the States and I think any product that used Beech-Nut in connection with selling of a product would be the result of a direct thought-out campaign, sir.

X-Q. 92. That is only your personal opinion, and that is objected to as voluntary. Did you ever hear of "Beech-Nut" whiskey?

A. No, sir.

X-Q. 93. You never heard of that being trade-marked?

A. No, sir.

X-Q. 94. Do you know how long P. Lorillard has been putting out Beech-Nut tobacco products?

A. Oh, as Beech-Nut products?

X-Q. 95. As tobacco products going under that trade name?

A. Hasn't it been about a year? It seems to me I recall something about it.

X-Q. 96. That is all you know about it?

A. That is all I know about it. I was called in here in twenty minutes.

X-Q. 97. Did you ever see a package similar to that tobacco (indicating)? Scrap tobacco?

A. No.

X-Q. 98. Whose name is on there?

A. Lorillard's.

X-Q. 99. Do you know how long Lorillard Company has been putting out that?

A. No, I don't.

X-Q. 100. If you went into a store and wanted to buy a package of Beech-Nut chewing gum, the product of the Beech-Nut Packing Company, could you be confused or deceived into accepting and purchasing a package of this P. Lorillard "Beech-Nut Cigarettes" in the place of that chewing gum? Would you take that for chewing gum?

A. Why, decidedly not, no sir.

X-Q. 101. I show you a copy of the first page of the Boston Herald of today, August 18, 1921, which has been marked in this case for identification as Defendant's Cross-Exhibit No. 5. Is that like the billboard advertisement you saw?

A. I don't recall, sir, really. I don't recall. I repeat to you I simply saw "Beech-Nut Cigarettes."

X-Q. 102. As you rode by?

A. As I rode by, yes.

Cross-examination closed.

*Re-Direct Examination by Mr. Hinton.*

R-D. Q. 103. Mr. Conant, did I understand you to say on your cross-examination you had sold tobacco products of P. Lorillard & Company?

A. Yes, sir.

R-D. Q. 104. Mr. Conant, was there any doubt in your

mind—I am simply asking for the fact—any doubt in your mind that the Beech-Nut Packing Company was putting out these cigarettes?

A. There never was for a second, no, sir.

R-D. Q. 105. Mr. Cavanagh has shown you a package of scrap tobacco and called your attention to the name "Lorillard" on it. Had you ever seen that package before today?

A. No; I hadn't ever seen that package before today, in all my tobacco selling.

Redirect examination closed. No recross-examination.

ALVAH L. CONANT.

HORACE R. PEARSONS, a witness produced in behalf of the plaintiff, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Horace R. Pearsons; thirty-eight years; wholesale grocer; 41 Clifton Street, Worcester.

Q. 2. Are you with the Daniels-Cornell Company?

A. Yes.

Q. 3. Wholesale grocer?

A. Yes.

Q. 4. What is your position with the company?

A. Treasurer and manager.

Q. 5. Do the Daniels-Cornell Company carry tobacco?

A. Yes.

Q. 6. How long have they carried tobacco products?

A. Always.

Q. 6a. To whom do they sell those tobacco products?

A. Retail stores.

Q. 7. Is that grocery stores?

A. Yes. No tobacco stores, just grocery stores.

Q. 8. I show you a package of Beech-Nut cigarettes, which is in evidence as "Beech-Nut Exhibit 1." Have you ever seen these cigarettes before? If so, about when did you first see them?

A. Well, I will tell you; I first saw them, when I saw the ads; must be six months ago; but the first time I ever really paid attention to them was about a couple of months ago.

Q. 9. When you first saw them about a couple of months ago, by whom did you think they were made?

A. I thought they were made by the Beech-Nut people.

Q. 10. How long did you continue to believe they were made by the Beech-Nut people?

A. Up within a couple of months ago. I examined a package in a window on Front Street and then found out it said "P. Lorillard Co." on the bottom.

Q. 11. Is there much scrap tobacco sold through this territory?

A. I don't know, I am sure; we never handle it. I never heard of it. You mean scraps of any kind?

Q. 12. Any scrap tobacco?

A. No, we have not had scrap tobacco.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 13. Do you sell tobacco yourself personally?

A. No, not personally.

X-Q. 14. Do you know of P. Lorillard Company? You do, don't you?

A. Yes.

X-Q. 15. So when you examined that package for the first time, you saw P. Lorillard's name on it, did you?

A. Yes.

X-Q. 16. If a customer came into your store, or if a party ordered from you Beech-Nut cigarettes made by the Beech-Nut Packing Company, would you hand them Beech-Nut cigarettes made by P. Lorillard Company?

A. No; I probably would not if they asked for them; I know they didn't make them.

X-Q. 17. You never heard of the Beech-Nut Packing Company making tobacco products such as cigarettes?

A. No.

X-Q. 18. What line have they been in?

A. Fruits, jams, bacon, beef, etc.

X-Q. 19. Food products?

A. Yes.

X-Q. 20. But if you went into a store and wanted to buy a package of Beech-Nut chewing gum made by Beech-Nut Packing Company, could you be confused or deceived by the salesman into accepting a package those Lorillard Beech-Nut cigarettes, in place of the chewing gum?

A. What is that you say?

X-Q. 21. If you went into a store and wanted to buy a package of Beech-Nut chewing gum made by the Beech-Nut Packing Company, could you be confused or deceived by the salesman into accepting a package of those Lorillard Beech-Nut Cigarettes, in place of the chewing gum?

A. No, I don't think so.

X-Q. 22. You think a person would be weak-witted that would, wouldn't you?

A. Yes.

X-Q. 23. I understand you never sold any scrap tobacco in your line of business?

A. No.

X-Q. 24. You are the sales manager for your concern?



A. Yes.

X-Q. 25. Where is that store located?

A. 78 Mulberry Street.

X-Q. 26. How many people do you employ in the whole department?

A. Thirty or forty offhand.

X-Q. 27. About how many salesmen?

A. Five salesmen.

X-Q. 28. I understand you handle tobaccos as a side line to groceries?

A. Grocery stores, yes.

X-Q. 29. But the main business is wholesale grocery?

A. That is our main business, yes, sir.

Cross-examination closed.

HORACE R. PEARSONS.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND  
FOR THE DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	} In Equity No. 3056.
<i>Plaintiff,</i>	
<i>vs.</i>	
P. Lorillard Company,	}
<i>Defendant.</i>	

*Commonwealth of Massachusetts,*  
*County of Worcester,*  
*District of Massachusetts, ss.*

I hereby certify that on the 18th day of August, 1921, before me, Penelope Comberbach, a notary public in and for the County of Worcester, Commonwealth of Massachusetts, acting as Special Commissioner, by consent and agreement of counsel, at my office No. 918 Park Bulding, in the City of Worcester, County of Worcester, Commonwealth of Massachusetts, personally appeared,

pursuant to notice, between the hours of nine o'clock A. M. and six o'clock P. M., the following witnesses, Joseph S. Aisenberg, Ralph H. Horne, Dorace L. Bottomly, John H. Lang, Alvah L. Conant and Horace R. Pearsons, and also Sebastian Hinton, Esq., of Offield, Poole, Hinton & Scott, appearing for Plaintiff, and Richard B. Cavanagh, Esq., of Meyers, Cavanagh Whitehead & Hyde, appearing for Defendant; and each and all of the said witnesses, Aisenberg, Horne Bottomly, Lang, Conant and Pearsons, being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as in the foregoing annexed depositions of each of them, set out.

I further certify that all of said depositions were begun and completed on the 18th day of August, 1921.

I further certify that the several exhibits attached to said depositions were offered in evidence and marked for identification as is set out in said depositions.

I further certify that each of said depositions was then and there reduced to typewriting under my personal supervision, and that each of said depositions, after it had been reduced to typewriting, was read over and subscribed by the witness making same, and that each and all of said depositions have been retained by me for the purpose of sealing up and directing the same to the Clerk of Court as required by law.

I further certify that the reason why these depositions were taken was that the respective witnesses making same all reside at Worcester, County of Worcester, Commonwealth of Massachusetts, more than one hundred miles from Trenton, New Jersey, the place where this cause is to be tried.

I further certify that I am not the counsel or attorney for either of the parties, or related by blood or marriage to either of the parties, nor am I interested in the event of the cause.

I further certify that the fees for taking said depositions, \$3.00, have been paid to me by the plaintiff and that the same are just and reasonable.

Witness my hand and official seal at Worcester, Massachusetts, this eighteenth day of August, 1921.

PENELOPE COMBERBACH,

[SEAL.]

Notary Public.

(Acting by consent of counsel as Special Commissioner.)

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company	}	In Equity No. 3056.
<i>vs.</i>		
P. Lorillard Company.		

I hereby certify that in the certificate by me attached to depositions in the above entitled case recently forwarded to the Clerk of the Court, the amount paid me for depositions was stated as \$3.00. This amount, however, was erroneous and referred merely to an amount paid for administering oaths. The total for taking the depositions including the reporting, etc., was \$80.50.

PENELOPE COMBERBACH,

[SEAL.]

Notary Public, Massachusetts.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, <i>Plaintiff,</i>	} In Equity    No. 3056.
<i>vs.</i>	
P. Lorillard Company, <i>Defendant.</i>	

Depositions taken on behalf of plaintiff, pursuant to notice and by agreement of counsel, before Walter C. Ross, a Notary Public in and for the State of Massachusetts, County of Hampden, acting as Special Examiner by consent of counsel, at 387 Main street, Springfield, Mass., beginning on Tuesday, August 23rd, 1921, at 12 noon.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, for plaintiff; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, counsel for defendant.

FRANKLIN G. NEAL, a witness produced pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your full name, age, residence, and occupation?

A. Franklin G. Neal; 36 years old; 23 Washington road, Springfield, Mass.; lawyer.

Q. 2. Do you smoke?

A. Yes.

Q. 3. Do you ever buy cigarettes?

A. Very seldom.

Q. 4. Have you recently bought any cigarettes?

A. Yes.

Q. 5. What kind did you buy?

A. Beech-Nut cigarettes.

Q. 6. When was this, and where was it, do you remember?

A. It was within two or three weeks, at one of the cigar stands in Springfield.

Q. 7. Would you be able to identify the cigarettes that you bought if you were shown a package of them?

A. Yes.

Q. 8. I show you a package of cigarettes, which is in evidence in this case as Beech-Nut Exhibit No. 1. Were these the Beech-Nut cigarettes that you bought?

A. Yes.

Q. 9. You have stated that you seldom buy cigarettes, but that you did buy a package of these Beech-Nut cigarettes. Why did you buy these cigarettes?

A. I expected to get a remarkable smoke.

Q. 10. What led you to that expectation?

A. Because I thought the cigarettes were made by the Beech-Nut Packing Company, and I am acquainted with their products.

Q. 11. Do you know what made you think that these cigarettes were made by the Beech-Nut Packing Company?

A. Because the label appeared to me to be the Beech-Nut label.

Q. 12. You have referred to the "Beech-Nut label." Can you explain what you mean by that expression?

A. The words "Beech-Nut," associated with a large oval and a general color scheme.

Q. 13. Have you seen that label previously on other products?

A. I have, many times. On chewing gum, candies and food products.

Q. 14. Have you purchased those products bearing that label?

A. Yes.

Q. 15. And what has been your experience with those products?

A. I have always found them to be of the very highest quality—exceptional in every respect.

Q. 16. After you had bought this package of Beech-Nut cigarettes, what did you do?

A. I smoked one of them.

Q. 17. Was your expectation that you would find these cigarettes remarkable fulfilled?

A. No.

Q. 18. What did you then do?

A. I looked the package over and found the name P. Lorillard on it.

Q. 19. What did you then conclude, Mr. Neal?

A. That there was some connection between the Beech-Nut Company and Peter Lorillard; or, I mean to say, there was probably some connection between the two, since the label was the same on the Beech-Nut products and on these cigarettes.

Q. 20. Do you now believe that there is some connection between the Beech-Nut people and the Lorillard Company?

A. No. You told me within a day or two that there was not.

Q. 21. Mr. Neal, you have testified that when you bought these cigarettes you expected that you would get a smoke which was remarkable and that expectation was not realized. Could you mention some well-known brand or brands of cigarettes which would correspond more or less to the kind of cigarettes that you expected to get when you saw the Beech-Nut label on cigarettes?

A. Well, I expected to get a cigarette unlike others I had known. But in a general way, I expected a quality at least comparable to such a cigarette as the Phillip Morris, or the Pall Mall.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 22. Mr. Neal, I understood you to say that you were a lawyer?

A. Yes.

X-Q. 23. What branch of law do you practice?

A. I specialize in patent and trade-mark law, but I also do a general office business.

X-Q. 24. Have you always practiced here in Springfield?

A. Yes.

X-Q. 25. Since you started to practice patent and trade-mark law, I mean?

A. Yes.

X-Q. 26. This testimony is being taken under notice in your office, is it not?

A. Yes.

X-Q. 27. And you have consulted with Mr. Hinton and have given him permission to take the testimony of other witnesses in this office; in other words, use your office, have you not?

A. Yes, I have.

X-Q. 28. How long have you practiced trade-mark law?

A. Since 1911.

X-Q. 29. Did you ever hear of the Beech-Nut Packing Company making any tobacco products of any sort whatsoever?

A. No.

X-Q. 30. You have heard of the P. Lorillard Company, haven't you?

A. I have.

X-Q. 31. What kind of business do you know them to be in?

A. Tobacco business.

X-Q. 32. When you purchased that package of Lor-

illard Beech-Nut cigarettes, you didn't examine it to see the name of the manufacturer or the producer thereon, did you?

A. No.

X-Q. 33. You have stated substantially that the cigarette did not meet your expectations. What do you smoke, mainly, cigars?

A. Yes, cigars and a pipe.

X-Q. 34. You have smoked cigarettes from time to time, haven't you?

A. I have.

X-Q. 35. Then, as a person who smokes, you know that different people have a preference for different brands?

A. I do.

X-Q. 36. And that what one man might consider to be a good brand might be distasteful, or appear to be a poor brand to another man?

A. Certainly.

X-Q. 37. You have stated that when you purchased that package of Beech-Nut cigarettes you expected to get a cigarette of the same class as the Pall Mall or the Phillip Morris. What does the Pall Mall cigarette sell for?

A. I have not the price of different brands of cigarettes in mind, but it is about 25 cents.

X-Q. 38. What does the Phillip Morris sell for?

A. About 25 cents.

X-Q. 39. And what did you pay for that package of Beech-Nut cigarettes?

A. I forget what I did pay for those cigarettes, but in the discussion with Mr. Hinton I was told that they sold for 15 cents. I realized at the time I bought them that they were not what I would consider the higher-priced cigarettes.

X-Q. 40. So that you could not expect to get for 15 cents the higher grade cigarettes that you would pay a quarter for, could you—10 cents difference to the pack?



A. I didn't ask the price of the cigarettes before taking a package, nor did I consider the price. In fact, I forgot the price. I bought the cigarettes solely upon the label.

X-Q. 41. Did you tell the clerk or the storekeeper that you wanted a cigarette that was the same class as the Pall Mall or the Phillip Morris?

A. No, I had no conversation with the clerk.

X-Q. 42. So, in the ordinary course of things you could not expect to get the same grade of cigarette for 15 cents that you could expect to get for a quarter, could you?

A. I did expect to, with the Beech-Nut label on the package.

X-Q. 43. And do you know anything about the tobacco industry—how the goods are blended, how the tobaccos are selected, where the tobacco in the Pall Mall or the Phillip Morris comes from, and other matters of that sort in connection with the manufacture of tobacco products like cigarettes?

A. I don't know, except in the most general way that these things are attended to.

X-Q. 44. You say that you have used or purchased Beech-Nut food products and chewing gum, and products of that sort?

A. Yes, I have.

X-Q. 45. And you are familiar with the label?

A. Yes.

X-Q. 46. Will you describe that label to me?

A. The label is not in my mind in any detail, but I will try to describe it generally as an oval label, with the long axis horizontal, the words Beech-Nut above the label (that is, along the upper line of the oval), and usually the name of the product somewhere on the label, and a general color of red and white. Also the representation of one of the beech-nuts, or more than one, I don't carry the exact detail in my mind.

X-Q. 47. And that oval that you speak of is in the nature of a wide red band, more than a line, is it not?

A. Well, the red band may be there, and I believe it is, for I have looked at the labels in the last day or two.

X-Q. 48. And that red band has printing on it? It is wide enough to carry plain printing, is it not?

A. I don't know whether it has printing on it or not.

X-Q. 49. And the beech-nut you refer to is a single cluster in the center of green leaves, is it not?

A. I don't know whether there are one or two beech-nuts. I have seen the labels with both since I have looked at these cigarette labels and the Beech-Nut labels, and they appear on the cigarettes and on the chewing gum, for example, and I have seen one or two nuts represented.

X-Q. 50. One or two nuts represented on what?

A. One nut on one label and two nuts on another label.

X-Q. 51. Can you produce specimens of those labels to which you have referred?

A. I have the package of cigarettes which I bought, and referred to in my answers, here with me. It is the only label I can produce, unless you or Mr. Hinton hand them to me.

Witness produces package.

X-Q. 52. I am afraid we are getting confused. I am not asking you about the label on the Lorillard cigarettes. I am asking you about the Beech-Nut labels on the Beech-Nut chewing gum and other products of the Beech-Nut Packing Company. I am asking you to describe that label for me, and in order to assist you I call your attention to a Beech-Nut label, which is marked in this case as Defendant's Cross Exhibit No. 3. Does that represent the Beech-Nut label?

A. It looks like that Beech-Nut label. I think it does represent the general impression which the Beech-Nut label has given to me.

X-Q. 53. So that is a single beech-nut superimposed on green leaves appearing in the center of the label, is it not?

A. Yes.

X-Q. 54. And it has two similar but smaller beech-nuts represented at the end of the oval, at the ends of the long axis of the oval, has it?

A. Yes.

X-Q. 55. And it has a wide red band, with the words "Beech-Nut Mints" on it in this particular case?

A. Yes.

X-Q. 56. If you went to a store and asked for Beech-Nut chewing gum of the Beech-Nut Packing Company, would you be deceived into taking a package of these Lorillard cigarettes in the place of or instead of the gum?

A. No.

X-Q. 57. And you never heard of any person being so confused or deceived, did you?

A. No.

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 58. Do you know how many cigarettes are in a package of Pall Mall or Phillip Morris cigarettes?

A. My memory is that there are ten.

R-D. Q. 59. You have produced on cross-examination the identical package of Beech-Nut cigarettes which you purchased. Will you give me that package?

Witness hands package to Mr. Hinton.

#### STIPULATION.

It is stipulated by and between the parties through their respective counsel that the package of cigarettes which is produced by the witness was, prior to being opened, identical with Beech-Nut Exhibit No. 1.

R-D. Q. 60. In opening this package of Beech-Nut cigarettes which you have produced, how much, if any, of the waxed paper covering the package was removed?

A. The top only, that is, the part of the waxed paper which covers the opening to the package.

R-D. Q. 61. Have you carried these cigarettes about in your pocket?

A. No.

R-D. Q. 62. Where did you just get them when you handed them to me?

A. I took them out of one of my desks before testifying.

Redirect examination closed.

*Recross Examination by Mr. Cavanagh.*

R-X Q. 63. Do you remember where you bought these cigarettes?

A. No, it was at one of the cigar stands at Springfield, but I do not remember which one.

R-X Q. 64. You just went in and asked for a package of Beech-Nut cigarettes.

A. No. I went in to buy some cigars and I saw the Beech-nut label on the package of cigarettes and that is the only reason I bought cigarettes.

R-X Q. 65. What did you say when you asked for the cigarettes?

A. I didn't say anything. The cigarettes were displayed on the top of the counter. I took a package and paid for it with my cigars.

R-X Q. 66. So you didn't ask for either cigarettes of the Beech-Nut Packing Company or cigarettes of the P. Lorillard Company, but you just took the package and paid for them.

A. That is all. I had no conversation with the clerk.

Signature waived.

Deposition closed.

SPRINGFIELD, MASS., 1:40 P. M.

CLEMENT W. KIRKPATRICK, a witness produced in behalf of plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. Clement W. Kirkpatrick; 35 years old; Chicopee Falls, Mass.; assistant to the general manager of the Fisk Rubber Company.

Q. 2. I show you a package of cigarettes, which is offered in this case as Beech-Nut Exhibit No. 1. Have you ever seen these cigarettes before?

A. I have.

Q. 3. When and where did you first see these Beech-Nut cigarettes?

A. March of this year in New York City.

Q. 4. Will you state the circumstances of your first seeing these Beech-Nut cigarettes?

A. I was down there visiting and during the course of a conversation I ran out of cigarettes and a friend of mine by the name of Mrs. Burrill told me I ought to smoke Beech-Nut cigarettes.

Q. 5. And what did you do?

A. Being out, I went down to a store and bought some.

Q. 6. When you saw and purchased these Beech-Nut cigarettes, by whom did you think they were put out?

A. By the Beech-Nut people, the same people that make the gum and candy products and things of that kind.

Q. 7. Subsequently to this incident of March, 1921, have you purchased other packages of these Beech-Nut cigarettes?

A. I have.

Q. 8. About how many have you purchased?

A. About a dozen.

Q. 9. Have you carried these cigarettes about with you and smoked them?

A. I have.

Q. 10. Do you now believe that these cigarettes are a product of the Beech-Nut Packing Company?

A. No.

Q. 11. When and how were you first advised that these cigarettes were not a product of the Beech-Nut Packing Company?

A. Mr. Frank Neal advised me this morning.

Q. 12. Have you ever had these cigarettes brought to you by somebody else?

A. I have.

Q. 13. What happened then?

A. I was out of cigarettes and my wife was going to the post office—this was last Saturday morning—and I asked her to get me some and didn't specify the brand and she brought these back with the remark that these ought to be good, because they were Beech-Nut, which stood for quality.

Q. 14. What brand of cigarettes was it that she brought you?

A. Beech-Nut.

Q. 15. Were those cigarettes that she brought you the same as this Exhibit No. 1 that I have shown you?

A. Yes, as far as I know.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 16. Mr. Kirkpatrick, I understand you are connected with the Fisk Rubber Company?

A. I am.

X-Q. 17. So that you have had considerable experience in manufacturing lines, particularly the rubber industries?

A. Yes.

X-Q. 18. How many years have you been in the rubber industry?

A. Thirteen years.

X-Q. 19. I understand that you bought your first package of Beech-Nut cigarettes like this Plaintiff's Exhibit No. 1 in New York City?

A. Yes, sir.

X-Q. 20. And when was that?

A. In March of this year.

X-Q. 21. Whose name appears on that package?

(Witness examines package, Exhibit No. 1.)

A. P. Lorillard Co.

X-Q. 22. Did you ever hear of the P. Lorillard Company?

A. I have heard of it.

X-Q. 23. What line of business were they in?

A. I assume that they are in the tobacco business.

X-Q. 24. They are large tobacco manufacturers?

A. Yes.

X-Q. 25. Do you find the name "Beech-Nut Packing Company" any place on that package?

(Witness examines package.)

A. No, unless it is in here (witness points to inside of package).

X-Q. 26. Do any of your goods of the Fisk Rubber Company bear the name "Fisk Rubber Company" on them?

A. No.

X-Q. 27. Any of the packages containing the goods?

A. No.

X-Q. 28. Any of the cartons?

A. No. The name "The Fisk Rubber Company."

X-Q. 29. Oh! Then my previous questions, to which you answered "No," were so answered because I omitted the word "The," but the packages or cartons, then, do bear the name of your concern?

A. Yes, sir.

X-Q. 30. And what does that indicate to the public?

A. That it is the product of The Fisk Rubber Company.

X-Q. 31. And judging from that, would you not take the name P. Lorillard Company on that package of cigarettes to indicate that it is the product of the P. Lorillard Company, tobacco manufacturers?

A. I would.

X-Q. 32. When you first purchased a package of the Lorillard Beech-Nut cigarettes like that Exhibit No. 1, did you look to see whose name was on it?

A. I didn't.

X-Q. 33. Then you didn't examine the package in particular, did you?

A. No.

X-Q. 34. I understand that you smoke cigarettes, do you not?

A. I do.

X-Q. 35. And you bought the Beech-Nut cigarettes several times since you purchased the first package?

A. I have.

X-Q. 36. Now, Mr. Kirkpatrick, basing your answer to this question of mine on your experience in the rubber industry, if you were going to purchase a rubber tire, say, or a rubber pair of shoes, would you purchase the goods of a concern that had been for years in the rubber industry or from a clothing house, say, that had just gone into the rubber business?

A. I would buy it from a concern that had been in business for years.



X-Q. 37. That had made a specialty of that business?

A. Yes, sir.

X-Q. 38. At your home do you use any products of the Beech-Nut Packing Company?

A. We do.

X-Q. 39. What are those products?

A. They are bacon and gum, those are the only ones I can think of just now.

X-Q. 40. Well, if you went into a store and wanted some Beech-Nut bacon or Beech-Nut chewing gum, could you be confused or deceived into taking a package of those Beech-Nut cigarettes in the place and stead of the bacon or gum?

A. I do not think so.

X-Q. 41. In other words, you would not take cigarettes when you wanted gum or bacon?

A. No, sir.

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 42. Do you smoke Camel cigarettes?

A. I do.

R-D. Q. 43. To what extent have you smoked Camel cigarettes?

A. Ordinarily, to about the same extent that I have others.

R-D. Q. 44. Do you smoke cigarettes all the time?

A. I do.

R-D. Q. 45. Have you smoked Lucky Strike cigarettes?

A. I have.

R-D. Q. 46. And how much have you smoked them?

A. I have smoked them about an equal proportion with the other brands.

R-D. Q. 47. How about Chesterfield cigarettes?

A. The same applies there.

R-D. Q. 48. And Fatimas?

A. The same.

R-D. Q. 49. What is written on the front of the package of Camel cigarettes underneath the picture of the Camel?

A. I do not know.

R-D. Q. 50. What is printed on the Lucky Strike cigarettes underneath the red panel, with the name "Lucky Strike" on it?

A. I do not know.

R-D. Q. 51. What is printed on the front of the Fatima cigarette package, underneath the name "Fatima" and the picture of a girl?

A. I do not know.

R-D. Q. 52. What is printed on the front of a Chesterfield package of cigarettes underneath the name "Chesterfield"?

A. I do not know.

Redirect Examination closed.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 53. Do you know what is printed on the Beech-Nut label for ham?

A. I do not.

R-X Q. 54. And likewise for chewing gum?

A. I do not know.

R-X Q. 55. Now, if you went into a store and you wanted, say, an Arrow shirt or an Arrow collar, of the Cluett-Peabody Company, and you wanted nothing but Cluett & Peabody goods, you would look and see if the Cluett & Peabody name was on it, wouldn't you?

A. I certainly would.

Signature waived.

Deposition closed.

MARTIN T. HUGGARD, a witness produced in behalf of plaintiff pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Martin T. Huggard; 55 Dresden Street, Springfield.

Q. 2. And your occupation?

A. Clerk.

Q. 3. In what kind of a store?

A. Meat and groceries.

Q. 4. Mr. Huggard, have you ever seen the so-called Beech-Nut cigarettes as advertised in the Springfield newspapers?

A. Yes, sir.

Q. 5. Would you recognize the advertisement that you saw if I were to show you a copy of it?

A. Yes, sir.

Q. 6. I show you a copy of the Boston Herald of August 18, 1921, marked for identification as Defendant's Cross Exhibit 5, and direct your attention to an advertisement of Beech-Nut cigarettes in that paper. Is this the advertisement that you saw?

A. It was like that. It was smaller. It was in the Daily News with small advertising.

Q. 7. When did you first see this advertisement?

A. Well, I can't tell just when. It was some time in April, along the latter part of April, 1921.

Q. 8. How frequently did you see that advertisement?

A. I saw it every day for quite a while.

Q. 9. When you saw that advertisement, as you have testified, every day for quite a while, by whom did

you believe that those cigarettes were being put out?

A. I thought by the Beech-Nut people.

Q. 10. What other products do those Beech-Nut people make, do you know?

A. Why, they have jams, beans, chewing gum, mints. Why, a whole lot of stuff.

Q. 11. Do you now believe that these cigarettes were put out by the Beech-Nut people?

A. I know that they are not.

Q. 12. How and when were you first advised that those cigarettes were not put out by the Beech-Nut people?

A. By Mr. Hover, the salesman.

Q. 13. Who is he employed by?

A. The Beech-Nut people.

Q. 14. And did he advise you about this?

A. Yes, he did.

Q. 15. And when was this?

A. Well, this was along—well, I should say the first of May some time, as near as I can recollect.

Q. 16. Was this after you had seen those advertisements that you refer to?

A. Yes, because I asked him how they were going, see?

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 17. Mr. Huggard, do you sell tobacco?

A. No, we do not sell tobacco.

X-Q. 18. You do not sell tobacco in your store?

A. No.

X-Q. 19. Do you smoke?

A. Yes, sure.

X-Q. 20. What do you smoke?

A. Cigarettes.

X-Q. 21. Did you ever buy the Beech-Nut cigarettes?

A. I never have. I never smoke them.

X-Q. 22. Did you ever examine a package of the Beech-Nut cigarettes?

A. I have never seen one. Only that one he (indicating Mr. Hinton) showed me.

X-Q. 23. When did Mr. Hinton show you that package of cigarettes?

A. Last Saturday morning.

X-Q. 24. Whose name appears on that package?

Witness examines package.

A. P. Lorillard Company.

X-Q. 25. Did you ever know of the Beech-Nut Packing Company putting out any tobacco products?

A. I never knew that they did. No, sir.

X-Q. 26. But you know that Lorillard puts out tobacco?

A. Yes, sir.

X-Q. 27. Mr. Hinton has called your attention to an advertisement in this Boston Herald of August 18, 1921, with reference to the Beech-Nut cigarette. Doesn't the name P. Lorillard Company appear there?

Witness examines paper.

A. Yes, it does.

X-Q. 28. So that you didn't examine the advertisement very carefully?

A. No, I didn't. I simply saw the package of cigarettes and "Beech-Nut" and as I supposed the Beech-Nut trademark.

X-Q. 29. So you just glanced at it carelessly and didn't examine it particularly at all?

A. Yes.

X-Q. 30. You can tell whether that wording on this advertisement is the same as in the advertisement you saw, is it?

A. No, I can't. I can't tell you.

X-Q. 31. If you went into a store and wanted to purchase a package of Beech-Nut chewing gum, or any of the other Beech-Nut Packing Company products you have mentioned, could you be confused or deceived into taking a package of cigarettes in place of those products?

A. If I went in to buy chewing gum?

X-Q. 32. Yes, and the man handed a package of those Lorillard cigarettes in the place of the gum or other Beech-Nut Packing Company products mentioned, would you take the cigarettes in place of gum?

A. Why, no, naturally not if I didn't ask for cigarettes. Not if I asked for gum and he gave me cigarettes.

X-Q. 33. You would be crazy, wouldn't you?

A. Yes.

Recross-examination closed.

Signature waived.

Deposition closed.

LOUIS ISENBERG, a witness produced in behalf of plaintiff pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. Louis Isenberg; 48, will be 49; 46 Warriner Avenue, Springfield, Mass.; manager of the Springfield, Public Market.

Q. 2. How many people are employed in the Springfield Public Market?

A. Why, somewheres around one hundred and twenty-five.

Q. 3. Have you ever seen in the Springfield papers the so-called Beech-Nut cigarettes?

A. I have seen it advertised.

Q. 4. Would you recognize one of those advertisements if I were to show you one?

A. I think so.

Q. 5. I show you an advertisement in the Boston Herald of August 18, 1921, marked for identification in this case as Defendant's Cross-Exhibit No. 5. Is that the advertisement that you have previously seen?

A. Somewhat similar.

Q. 6. When you saw that advertisement, by whom did you think that those cigarettes were being put out?

A. By the Beech-Nut Packing Company.

Q. 7. Do you now believe that those cigarettes were put out by the Beech-Nut products people?

A. No.

Q. 8. When and how were you first advised that they were not?

A. Yesterday, August 22nd, you told me.

Q. 9. Did you ever hear any remark made about these Beech-Nut cigarettes?

A. Yes, sir.

Q. 10. How did that come about?

A. Some gentleman friend of mine called at the house one evening and he was smoking cigarettes and my wife passed the remark. She says, "I see the Beech-Nut people are putting out a cigarette."

Q. 11. And when was this?

A. Only a week ago, a little over a week ago.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 12. Mr. Isenberg, do you sell tobacco products and cigarettes?

A. We sell only edibles—food products.

X-Q. 13. Do you sell any food products of the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 14. What do you sell?

A. Well, practically their full line. Jellies, jams, preserves, gum and we got some marshmallows, bacon and dried beef, pork and beans, catsup, chili sauce, macaroni, spaghetti, also cereal coffee. I guess that is pretty much all they make. Also drinks—ginger ale, sarsaparilla and birch beer.

X-Q. 14a. Have you ever heard of the Beech-Nut Packing Company putting out any tobacco products?

A. I was under the impression when I seen that advertisement that they put out cigarettes.

X-Q. 15. I am not asking now for your impression or what you thought, but did you ever know them to put out any tobacco products?

A. Not to my knowledge.

X-Q. 16. When you saw this advertisement did you see the name P. Lorillard Company?

A. No, I didn't look close enough. I just seen Beech-Nut on that and thought it was one of their products. I was not interested in the tobacco end of it.

X-Q. 17. Well, the name P. Lorillard Company is on that advertisement, isn't it?

Witness examines advertisement.

A. Yes, I see it now.

X-Q. 18. Did you ever buy any Beech-Nut cigarettes of the P. Lorillard Company?

A. No, I do not smoke cigarettes.

X-Q. 19. So you just never buy cigarettes?

A. No.

X-Q. 20. If you went into a store and wanted to buy



some Beech-Nut bacon or Beech-Nut gum or any of the other products which you have mentioned as being put out by the Beech-Nut Packing Company, could you be confused or deceived into taking a package of these Beech-Nut cigarettes?

A. I positively would—that is, if I bought cigarettes I would take it for Beech-Nut product.

X-Q. 21. So you would go into a store and ask the man for a package of Beech-Nut gum and if he handed you a package of Beech-Nut cigarettes you would take them?

A. I would not take it for cigarettes.

X-Q. 22. But you told me you would.

A. I would if I asked for cigarettes and they said they had Beech-Nut cigarettes. I would take it for a Beech-Nut product.

X-Q. 22a. I didn't ask you that. I asked you if you would take gum for cigarettes.

A. No, why should I take gum for cigarettes?

X-Q. 23. Didn't you say awhile ago that you had never heard of the Beech-Nut people putting out tobacco products like cigarettes?

A. Yes, I didn't know they put out any tobacco products.

X-Q. 24. And the name P. Lorillard Company is on this package, Exhibit No. 1, is it not?

Witness examines package.

A. Yes.

X-Q. 25. And it is on the advertisement, isn't it?

Witness examines paper.

A. From what I see, it is.

X-Q. 26. And you do not find the name of the Beech-Nut Packing Company on that package, do you?

A. No, sir.

X-Q. 27. The Beech-Nut products which you sell have the name "Beech-Nut Packing Company" on them?

A. They all have the name on them. This label is similar to the Beech-Nut label.

X-Q. 28. You say that is the same label?

A. Very similar.

X-Q. 29. Will you describe the Beech-Nut label to me that they use on Beech-Nut products?

A. Well, it is an oval label with a red border around it. I think you have one there. (Witness points to label in Mr. Cavanagh's hand.)

X-Q. 30. I show you a label which is marked in this case as Defendant's Cross Exhibit 3. Is that the Beech-Nut label to which you refer?

A. Yes.

X-Q. 31. Will you look at this Exhibit No. 1? Do you find any wide red oval band with printing on it?

Witness examines exhibit.

A. No, not on this package of cigarettes.

X-Q. 32. I notice on the Beech-Nut Packing Company label a single beech-Nut overlying three green leaves; do you find that on this?

A. No, sir.

X-Q. 33. And I notice two single beech-nuts at opposite sides of the central beech-nuts—these two beech-nuts being single nuts mounted on green leaves. Do you find that there?

A. No, not there.

Signature waived.

Deposition closed.

ADELARD J. LANDRY, a witness produced in behalf of plaintiff pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. Adelard J. Landry; 27; 83 College Street, Springfield; clerk—meat cutter.

Q. 2. I show you a package of Beech-Nut cigarettes in evidence in this case as Beech-Nut Exhibit No. 1. Have you ever seen cigarettes like these displayed for sale in Springfield stores?

Witness examines Exhibit No. 1.

A. Yes, sir.

Q. 3. And how long have you seen these cigarettes?

A. Well, I should say along four or five months.

Q. 4. When you first saw these cigarettes, by whom did you believe that they were made?

A. By the Beech-Nut Packing Company.

Q. 5. And how long did you continue to believe that?

A. Why, I believed it until the salesman insisted that they did not make them. I should say about six weeks ago or two months.

Q. 6. And what was this salesman's name?

A. The salesman for the Beech-Nut people—Mr. Hover.

Q. 7. I call your attention to the brand on these cigarettes. Have you ever seen that brand on other products?

A. Yes, sir.

Q. 8. Can you tell some of the other products on which you have seen this brand?

A. Why, on all the jams and Beech-Nut gum. I

could name a half a dozen if I could think of them. All the Beech-Nut house packing products. On all of them.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 9. Where are you employed?

A. At 1083 State Street.

X-Q. 10. What line of business is that?

A. Meat and groceries.

X-Q. 11. Do you sell tobacco products?

A. No, sir.

X-Q. 12. You don't handle them at all?

A. No, sir.

X-Q. 13. Do you smoke yourself?

A. Cigars and tobacco.

X-Q. 14. Do you ever smoke cigarettes?

A. Not for the last six or seven years.

X-Q. 15. Did you ever buy a package of these Beech-Nut cigarettes like Exhibit No. 1?

A. No, sir.

X-Q. 16. You notice the name P. Lorillard Company on that?

A. Yes, I notice it. I'd never notice it unless you pick it up and glance it over very thoroughly.

X-Q. 17. Did you ever have a package of these Beech-Nut cigarettes in your possession before today?

A. No.

X-Q. 18. So, when I handed you these cigarettes it was the first time you ever handled this package?

A. Yes, sir.

X-Q. 19. It was the first time you ever closely examined this package?

A. Yes, sir.

X-Q. 20. Are you familiar with the label of the

Beech-Nut Packing Company that it uses upon its gum and various food products?

A. Yes, sir.

X-Q. 21. I show you a label which is in this case as Defendant's Cross-Exhibit 3, is that the Beech-Nut Packing Company label?

A. Yes, sir.

X-Q. 22. That label has a wide red oval band, has it not?

A. Yes, sir.

X-Q. 23. And that band has the words "Beech-Nut Mints" on it?

A. Yes, sir.

X-Q. 24. This package of cigarettes has no such oval band, has it?

A. No, it has not.

X-Q. 25. And this label has in the center a single beech-nut imprinted upon three green leaves, has it not?

A. Yes, sir.

X-Q. 26. You do not find any such beech-nut on this package, do you?

A. No, sir.

X-Q. 27. And this label has the words "Beech-Nut Packing Company" on it, has it not?

A. Yes, sir.

X-Q. 28. And you do not find any words "Beech-Nut Packing Company" on that package, do you? Will you examine it?

Witness examines package.

A. No, there is not, sir.

X-Q. 29. Did you ever hear of the P. Lorillard Company?

A. Yes, sir.

X-Q. 30. They are large tobacco manufacturers, are they not?

A. Yes, sir.

X-Q. 31. Well known tobacco manufacturers?

A. Yes, sir.

X-Q. 32. If you saw a package of tobacco products, such as these cigarettes, with that name on it, you would naturally presume that that was a product of the P. Lorillard Company, the tobacco manufacturers, would you not?

A. Yes, sir.

X-Q. 33. Now, Mr. Landry, if you went into a store and you wanted to buy a package of Beech-Nut chewing gum, or some Beech-Nut bacon, say, could you be fooled or confused or deceived into taking a package of these Lorillard Beech-Nut cigarettes in the place of your gum or bacon?

A. Why, I do not quite understand you, sir. I wouldn't be fooled. I can't get you clear. I would not buy bacon for cigarettes.

X-Q. 33a. That is what I mean, you would not be fooled into buying cigarettes for chewing gum when you asked for gum?

A. Why, certainly not.

X-Q. 34. And likewise, if you asked for a pound of Beech-Nut bacon, you would not be fooled into buying Beech-Nut cigarettes, would you?

A. No, sir.

Signature waived.

Deposition closed.

ROBERT N. BROUGHTON, a witness produced in behalf of plaintiff pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Robert N. Broughton; 34; 151 Sherman Street, Springfield, Mass.; druggist, pharmacist.

Q. 2. Do you sell tobacco products in this store?

A. Yes.

Q. 3. I show you a package of Beech-Nut cigarettes in evidence in this case as Beech-Nut Exhibit No. 1, have you sold these cigarettes in this store?

A. Yes.

Q. 4. How long?

A. Since they were on the market, since they started around leaving the packages in the store. Since they have been on the market, I presume.

Q. 5. Was that in the Spring of this year?

A. Yes, March or April.

Q. 6. When you first saw and sold these cigarettes over the counter, by whom did you think they were put out?

A. By the Beech-Nut Packing Company.

Q. 7. Do you now believe that these cigarettes are a product of the Beech-Nut Packing Company?

A. No, I do not.

Q. 8. How were you first advised that these cigarettes were not a product of the Beech-Nut Packing Company?

A. By your representative who came around here first. He called my attention to it.

Q. 9. And what company did he represent?

A. The Beech-Nut Packing Company.

Q. 10. And how long ago was this?

A. It seems a month ago.

Q. 11. And in this period from March or April, 1921, until about a month ago did you personally sell these cigarettes over the counter?

A. Yes, I did.

Q. 12. Did you hand the cigarettes to the customers?

A. Yes.

Q. 13. I call your attention to the brand on this package of cigarettes. Have you ever seen that brand on other products?

A. Yes. I have seen them on Beech-Nut gum and on Beech-Nut peanut butter.

Q. 14. And any other products, you think?

A. Beech-Nut bacon, Beech-Nut mints.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 15. Are you still buying these Beech-Nut cigarettes?

A. I have not bought any in a week's time.

X-Q. 16. Who do you buy them from?

A. Whitcomb.

X-Q. 17. Who is Whitcomb; what kind of business?

A. Wholesale cigar jobbers.

X-Q. 18. You did not buy from the manufacturer direct?

A. No. The first carton I bought I bought direct from their salesman, the P. Lorillard Company salesman. I paid him cash right on the spot.

X-Q. 19. He didn't tell you that those cigarettes were made by the Beech-Nut Packing Company?

A. He didn't say anything. He simply said they were Beech-Nut cigarettes.



X-Q. 20. You notice the name "P. Lorillard Company" on this package, do you not?

A. I do now.

X-Q. 21. Did you ever look at this package to decide whether the goods were those of the P. Lorillard Company or the Beech-Nut Packing Company?

A. I never did.

X-Q. 22. Just handed the cigarettes out?

A. Yes. If they called for Beech-Nut I handed them out.

X-Q. 23. That name, P. Lorillard Company, on this package of cigarettes, Plaintiff's Exhibit No. 1, indicates to you that it is the product of the P. Lorillard Company, does it not?

A. Yes, it does.

X-Q. 24. You never heard of the Beech-Nut Packing Company putting out any tobacco products whatsoever?

A. I never did, no.

X-Q. 25. You never had a man come into this store and say "I want a package of Beech-Nut cigarettes made by the Beech-Nut Packing Company," and then you handed him a package of P. Lorillard Company's cigarettes, did you?

A. No, I never heard him say that.

X-Q. 26. And you never sold him Lorillard's cigarettes when he asked you for Beech-Nut Packing Company cigarettes, did you?

A. No.

X-Q. 27. As I understand it, you sold Beech-Nut chewing gum of the Beech-Nut Packing Company, didn't you?

A. Yes.

X-Q. 28. You never sold anybody Lorillard's cigarettes when they wanted and asked you for Beech-Nut chewing gum or any of the other Beech-Nut Packing Company products which you have?

A. No.

X-Q. 29. If you yourself went into a store and asked for Beech-Nut chewing gum you could not be fooled into taking a package of the Lorillard Beech-Nut cigarettes for chewing gum, could you?

A. Not for chewing gum.

X-Q. 30. It would be absurd, would it not?

A. Yes.

X-Q. 31. I show you a label which is in this case as Defendant's Cross-Exhibit 3. Does that represent the Beech-Nut label of the Beech-Nut Packing Company?

A. Well, I never particularly noticed. It looks very much like it.

X-Q. 32. Whose name appears on it?

A. Beech-Nut Packing Company. Besides without you looked at it you would think it was. Beech-Nut is Beech-Nut with us in the store. We don't pay attention to who it is made by. We just know them by what they ask for.

X-Q. 33. If he says "Beech-Nut" what do you hand him?

A. If he asks for Beech-Nut gum at the candy counter we hand him Beech-Nut gum. If he asks for cigarettes at the cigarette counter, we hand him cigarettes.

X-Q. 34. The two counters are separate. One at one side of the store and the other at the other?

A. Yes.

X-Q. 35. By the two counters I mean the candy counter is one place where you keep the gum and the tobacco counter is at the other side where you keep the tobacco and where you keep these Beech-Nut cigarettes?

A. Yes.

Signature waived.

Deposition closed.

GEORGE L. CARLTON, a witness produced pursuant to notice and by agreement of counsel, first being duly sworn, deposes and says as follows, in answer to interrogatories propounded by Mr. Hinton:

Q. 1. Please state your name, age, place of residence and occupation.

A. George L. Carlton, grocer, 929 Dwight Street, Holyoke, Mass., 47 years of age.

Q. 2. Do you sell tobacco products in your grocery store?

A. Yes.

Q. 3. I show you a package of cigarettes, which is in this case, as Exhibit No. 1. (Mr. Hinton displays to Mr. Carlton a package of cigarettes.) Have you ever sold these cigarettes in your store?

A. Yes.

Q. 4. How long have you sold them?

A. Since the early spring of 1921.

Q. 5. When you bought these cigarettes which other product did you have for sale?

A. Beech-Nut. The same people that put up the canned goods and the gum.

Q. 6. Why did you put Beech-Nut cigarettes in? Do you remember?

A. Well, Beech-Nut product is a good seller. Then I thought they would sell good, the same as the gum and the same as the canned goods.

Q. 7. How long did you continue to think that these cigarettes were a Beech-Nut product?

A. Until Mr. Hover, drummer, who sells Beech-Nut products, told me the Beech-Nut Packing Company had nothing to do with it.

Q. 8. Who is Mr. Hover?

A. Beech-Nut drummer, fellow who sells the goods.

Q. 9. How long after you had put in these cigarettes did Mr. Hover tell you that the Beech-Nut Packing Company had nothing to do with them?

A. Why, a month, I guess, after I had the cigarettes in.

Q. 10. Did you yourself sell these cigarettes over the counter during that month?

A. Yes.

Q. 11. Did you hand packages of the cigarettes to your customers?

A. Yes.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 12. Mr. Carlton, you state that you bought these Beech-Nut cigarettes about last spring?

A. Yes.

X-Q. 13. From whom did you first buy them?

A. Well, the drummer's name I do not know. There were two of them together. I did not ask him his name. He says we have new packages of cigarettes, Beech-Nut brand. He said there are twenty cigarettes in a package for fifteen cents and ought to be a good seller. The Beech-Nut brand is a good brand and it ought to sell. I will take some of them.

X-Q. 14. Did you ask him if those cigarettes were made by the Beech-Nut Packing Company?

A. Well, now, I do not remember whether I did or not.

X-Q. 15. Have you bought any of those cigarettes since?

A. Yes, I have, right along.

X-Q. 16. Are you still buying cigarettes like these? (Mr. Cavanagh here exhibits a package of P. Lorillard Company's Beech-Nut cigarettes to Mr. Carlton.)

A. Yes.

X-Q. 17. So after the Beech-Nut Packing Company's agent told you they were not made by the Beech-Nut Packing Company you still continued to buy them? And have you a good sale for them?

A. Well, pretty fair.

X-Q. 18. Do you notice the name "P. Lorillard Company" on this package of cigarettes? (Mr. Cavanagh exhibits a package of P. Lorillard Company's Beech-Nut cigarettes to Mr. Carlton.)

A. Yes.

X-Q. 19. You know they are not a product of the Beech-Nut Packing Company?

A. Yes.

X-Q. 20. The Lorillard Company is a large and well known tobacco concern, is it not?

A. Yes.

X-Q. 21. If you had taken the trouble to look at that package when you first bought those cigarettes you would have known that it was P. Lorillard Company's product, would you not?

A. Yes.

X-Q. 22. You did not find on that package the name of the Beech-Nut Packing Company, did you?

A. Only that Beech-Nut brand.

X-Q. 23. You mean that name Beech-Nut?

A. Yes.

X-Q. 24. Do you sell Beech-Nut chewing gum?

A. Yes.

X-Q. 25. And Beech-Nut bacon?

A. Yes.

X-Q. 26. If a customer came into your store and asked you for a package of Beech-Nut chewing gum, or asked you for a pound of Beech-Nut bacon, you would not hand him this package of Beech-Nut cigarettes in the place of the gum or bacon, would you?

A. Of course not.

X-Q. 27. You would think or say you were crazy for taking these cigarettes for Beech-Nut chewing gum?

A. Yes.

X-Q. 28. You know that these cigarettes are the cigarettes of the P. Lorillard Company?

A. Yes. I never examined the package. Never noticed the name on the package.

X-Q. 29. You have lots of food products that you do not notice?

A. Yes. The name of the party that is making them I do not know. The brand is all there is. We go by the brand.

X-Q. 30. From whom do you buy your Beech-Nut cigarettes?

A. Kaffir Cigar Company. Sometimes from H. G. Sears.

X-Q. 31. And these people are tobacco jobbers and not manufacturers and wholesalers?

A. Yes.

X-Q. 32. And do you buy direct from P. Lorillard Company?

A. No.

X-Q. 33. You never buy direct from P. Lorillard Company?

A. Not unless those two fellows were from there. That I do not know.

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 34. Do you know whether H. G. Sears sells other things than tobacco products?

A. Yes.

R-D. Q. 35. What do they sell besides tobacco products?

A. Confectionery, fruits, groceries, etc.

R-D. Q. 36. Does the Kaffir Cigar Company run a wholesale grocery business?

A. Wholesale and retail.

Redirect examination closed.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 37. How many people do you employ in your store?

A. Three or four.

R-X Q. 38. You do retail grocery business?

A. Yes.

R-X Q. 39. Your store is in a residential neighborhood?

A. Yes.

R-X Q. 40. That's all Mr. Carlton. Thank you.

Recross-examination closed.

Signature waived.

Deposition closed.

MICHAEL O'CONNOR, a witness produced pursuant to notice and by agreement of counsel, first being duly sworn, deposes and says as follows, in answer to interrogatories propounded by Mr. Hinton:

Q. 1. Please state your name, age, place of residence and your occupation.

A. Michael O'Connor; age, 32; residence, 801 Canal street, Holyoke, Mass.

Q. 2. Your occupation, Mr. O'Connor?

A. Clerk.

Q. 3. In what kind of a store?

A. General store, public market.

Q. 4. Mr. O'Connor, I show you a package, which is in

this case as Beech-Nut Exhibit No. 1. Have you ever seen these cigarettes, and if so, when did you first see them?

A. Six months ago.

Q. 5. Did you ever buy any of these cigarettes (Mr. Hinton here exhibiting a package of Beech-Nut cigarettes to Mr. O'Connor)?

A. Once.

Q. 6. Why did you buy these cigarettes, do you remember?

A. Because they were new on the market and I tried them, seeing the Beech-Nut label, and thought I would take a shot at it.

Q. 7. When you saw and bought these cigarettes, by whom did you think they were made?

A. By the Beech-Nut people. They put out chewing gum, peppermint candies, and I thought that they had gone into the tobacco business.

Q. 8. Do you now believe that the Beech-Nut people put out these cigarettes?

A. No. I do not.

Q. 9. When were you first advised that the Beech-Nut people did not put out these cigarettes, and by whom?

A. By one of your salesmen, Mr. Hover.

Q. 10. What company does Mr. Hover represent?

A. The Beech-Nut Company.

Q. 11. How long after you had bought and smoked these Beech-Nut cigarettes was it that Mr. Hover told you?

A. About two weeks. Near there anyway. Two weeks anyway.

Direct examination closed.



*Cross-Examination by Mr. Cavanagh.*

X-Q. 12. Mr. O'Connor, when was it you said that you bought a package of Beech-Nut cigarettes?

A. The first package I bought of them was maybe two months ago.

X-Q. 13. Around about June, 1921?

A. Possibly, yes.

X-Q. 14. Have you bought any of these cigarettes since?

A. No.

X-Q. 15. Do you sell tobacco in the store where you work?

A. No.

X-Q. 16. Did you ever buy tobacco from tobacco manufacturers in your line of business; that is, to sell in your store?

A. I do not handle tobacco of any description.

X-Q. 17. You notice the name of P. Lorillard Company? (Mr. Cavanagh here exhibits a package of Beech-Nut cigarettes of the P. Lorillard Company to Mr. O'Connor.)

A. Now I do, yes.

X-Q. 18. When you first purchased a package of these cigarettes, about two months ago, you did not notice the name on it, did you?

A. No, I did not.

X-Q. 19. You did not ask the dealer who they were made by, did you?

A. No, I did not.

X-Q. 20. You just went in and bought cigarettes and told him just what you wanted?

A. I just went in and said, "Give me a package of Beech-Nut cigarettes."

X-Q. 21. That was the only thing you asked him?

A. Yes.

X-Q. 22. Then you did not notice the package in particular when you bought the cigarettes?

A. I did not notice it, only the label and the beech-nuts. The label was similar to the other ones and the regular beech-nuts, that is why I took them.

X-Q. 23. Are you familiar with the regular Beech-Nut label?

A. Yes. Well, to a certain extent I am.

X-Q. 24. I show you a label, which is in this case as the Defendant's Cross-Exhibit No. 3; is that the regular Beech-Nut label?

A. No, it is not.

X-Q. 25. This label which I have shown you has a wide red label, has it not?

A. It has.

X-Q. 26. And it has the words "Beech-Nut Mints" on it, and it has a single beech-nut in the center on green leaves, has it not?

A. It has.

X-Q. 27. It is not like them? (Mr. Cavanagh displays the label on the cigarette package put out by the P. Lorillard Company to Mr. O'Connor.)

A. No, it is not.

X-Q. 28. On this defendant's label you find the words, "Beech-Nut Packing Company, Canajoharie, New York," do you not? (Mr. Cavanagh displays label to Mr. O'Connor.)

A. Yes.

X-Q. 29. Mr. O'Connor, if you went into a store and you wanted to buy some Beech-Nut chewing gum or some Beech-Nut bacon, would you be confused or be deceived into permitting the dealer to sell you a package of Beech-Nut cigarettes in the place of the gum or the bacon you asked for?

A. Why, that would be out of the question.

X-Q. 30. In other words, they are different things and you wouldn't be fooled, would you?

A. Of course not.

X-Q. 31. You would not take bacon for cigarettes?

A. No, of course not.

X-Q. 32. You would not take chewing gum for cigarettes?

A. No, of course not.

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 33. Do you recognize this label that I now show you?

(Mr. Hinton displays to Mr. O'Connor the Beech-Nut Packing Company's label.)

A. Beech-Nut brand.

R-D. Q. 34. Is that a Beech-Nut label?

A. That nut in the center does not look familiar to me.

R-D. Q. 35. Can you describe the nut in the center of the regular Beech-Nut label; what does it look like?

A. Well, if I am right, I always figure there are two nuts there.

R-D. Q. 36. That is on the regular Beech-Nut Packing Company's label?

A. Yes.

NOTE.—The label which has been shown to the witness is marked for identification "Plaintiff's Exhibit," and is a Beech-Nut strawberry jam label.

Redirect examination closed.

Signature waived.

Deposition closed.

HENRY LE CLAIR, a witness produced pursuant to notice and by agreement of counsel, first being duly sworn, deposes and says as follows, in answer to interrogatories propounded by Mr. Hinton:

Q. 1. Please state your name, age, place of residence and occupation.

A. Henry Le Clair; 289 Walnut street, Holyoke, Mass.; age, 28.

Q. 2. What is your occupation?

A. Grocer.

Q. 3. Do you smoke, Mr. Le Clair?

A. Yes.

Q. 4. I show you a package of cigarettes, which is in this case as Beech-Nut Exhibit No. 1. (Mr. Hinton displays package of Beech-Nut cigarettes to Mr. Le Clair.) Have you ever seen these cigarettes before?

A. I have.

Q. 5. Have you bought and smoked these cigarettes?

A. I have.

Q. 6. When you saw, bought and smoked these cigarettes, by whom did you think they were put out?

A. Well, by the Beech-Nut people, of course. I did not notice and did not care who they were put out by.

Q. 7. How long did you continue to think that these cigarettes were put out by the Beech-Nut people?

A. A couple of weeks, I suppose. As soon as the salesman came around.

Q. 8. What salesman was this, do you remember?

A. Your Holyoke salesman of the Beech-Nut Company.

Q. 9. Do you remember what you said to this salesman when he came around?

A. The only thing I told him was "what are they going to put out next?"

Q. 10. Did he tell you that these cigarettes were not a product of the Beech-Nut Company?

A. He did.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 11. Are you the proprietor of this store, Mr. Le Clair?

A. Yes.

X-Q. 12. Where did you buy these cigarettes?

A. At George Carlton's store across the street. I sent a boy after them.

X-Q. 13. You do not sell tobacco products in your store, do you?

A. No.

X-Q. 14. And you never buy any tobacco products to sell from your store, do you?

A. No.

X-Q. 15. You notice P. Lorillard Company on this package of cigarettes, don't you? (Mr. Cavanagh displays a package of P. Lorillard Company's cigarettes to Mr. Le Clair.)

A. I notice it after I have been shown. I never cared to look at it. I gave them away. I could not smoke them.

X-Q. 16. You did not pay any attention to the package at all?

A. No.

X-Q. 17. How many times have you bought these Beech-Nut cigarettes?

A. Once.

X-Q. 18. You did not like the cigarettes, did you?

A. No.

X-Q. 19. As a smoker you know that different people have different tastes for tobacco; and you know that what one man might like another might dislike?

A. Certainly.

X-Q. 20. Do you sell Beech-Nut Packing Company's products?

A. Yes.

X-Q. 21. Do you sell chewing gum?

A. Yes.

X-Q. 22. Do you sell jam and bacon?

A. Yes.

X-Q. 23. Do you sell peanut butter and ginger ale?

A. Yes.

X-Q. 24. If you went into a store and wanted to purchase Beech-Nut chewing gum or ginger ale, would you be fooled by the salesman into taking a package of these cigarettes? (Mr. Cavanagh exhibits a package of P. Lorillard Company's cigarettes.)

A. I notice the package by looking at it, and after I have once seen the package I could tell it.

X-Q. 25. If you wanted a package of Beech-Nut chewing gum, would you take a package of cigarettes in the place of the gum?

A. No, of course not.

X-Q. 26. They are different things, are they not?

A. Yes.

Cross-examination closed.

Signature waived.

Deposition closed.

HENRY BUTCHER, a witness produced pursuant to notice and by agreement of counsel, first being duly sworn, deposes and says as follows, in answer to interrogatories propounded by Mr. Hinton:

Q. 1. Please state your name, age, place of residence and occupation.

A. Henry Butcher; 476 South street, Holyoke, Mass.; age, 52.

Q. 2. Give me your occupation.

A. Grocer and merchant.

Q. 3. Is your grocery store in the business part of Holyoke, Mass.?

A. I would say that it is in the center of things.

Q. 4. How many clerks do you employ in your store?

A. Seven.

Q. 5. Did you see the advertising of Beech-Nut cigarettes displayed in this territory, and if so, when did you first see it?

A. Along in the springtime, about April.

Q. 6. When you saw the advertising of the cigarettes, by whom did you believe these cigarettes were made?

A. By the Beech-Nut Packing Company.

Q. 7. Why did you think they were made by the Beech-Nut Packing Company?

A. Because I know of no other company by that name.

Q. 8. I call your attention to the brand on the cigarettes, Beech-Nut Exhibit No. 1. What company does that brand suggest to you?

A. It suggests to me the Beech-Nut Packing Company, Canajoharie, New York.

Q. 9. Do you now believe that these cigarettes are made by the Beech-Nut Packing Company?

A. No, I do not believe it now because I know different.

Q. 10. When did you first find out that they were not made by them?

A. I took it up with your salesman and expressed my sentiments in regard to the Beech-Nut Packing Company doing anything of that sort. That is how I received my information. I got it from the salesman.

Q. 11. What were your sentiments about that, Mr. Butcher?

A. My sentiments were that the Beech-Nut Packing

Company's standard was lowered by the fact that they were putting out cigarettes under their own label. I was very much surprised to think that they would do a thing of that sort. It seemed to me that the output of cigarettes and foods were decidedly at variance. One was beneficial and the other was not.

Q. 12. For how long a time did you believe that these cigarettes were put out by the Beech-Nut Packing Company after you first saw the advertising?

A. I could not say definitely as to that.

Q. 13. Would it be more or less than one month?

A. Well, I could not say. It might have been a month, and it might have been longer.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 14. Do you sell tobacco products and groceries in your store?

A. No.

X-Q. 15. Do you use cigarettes?

A. No.

X-Q. 16. You don't believe in people using tobacco?

A. I am always opposed to it.

X-Q. 17. You have never, of course, bought a package of Beech-Nut cigarettes?

A. No.

X-Q. 18. Did you ever closely examine a package of them?

A. No.

X-Q. 19. You did not notice the name P. Lorillard Company on the package?

A. I could not say that they were Lorillard Company's. I did not examine the package anyway. I did not know that the name Lorillard Company was on there until after Mr. Hover had informed me that the Beech-



Nut Packing Company did not make the cigarettes. I never examined the package.

X-Q. 20. You see the name P. Lorillard Company on that package? (Mr. Cavanagh exhibits a package of P. Lorillard Company's Beech-Nut cigarettes to Mr. Butcher.)

A. Yes, I see it now.

X-Q. 21. Do you know that they are large tobacco merchants?

A. Yes.

X-Q. 22. That name on the package would indicate it was one of their packages?

A. Certainly if I saw it, but I did not see it.

X-Q. 23. And you did not see it because you never examined the package?

A. No, I never examined the package.

X-Q. 24. Mr. Butcher, if a man came into your store and wanted a package of Beech-Nut cigarettes, would you sell him Beech-Nut chewing gum or Beech-Nut ham for cigarettes?

A. That looks to me like a foolish question. What do you take me for, a fool?

X-Q. 25. In other words, as you said before, you consider them widely different classes of goods?

A. I consider them diametrically opposed. One product is to eat and the other is for pleasure. I do not consider that smoking lets every man live. I do not consider it necessary to smoke in order to live. They get along without it in the Springfield jail, and they get along without it in the hospitals, but they cannot get along very well without their baked beans.

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 26. Mr. Butcher, how do you regard the Beech-Nut products?

A. A No. 1. Highest thing possible to make. I haven't anything better in my store than the Beech-Nut Packing Company's goods, and don't see how they can make them any better.

Redirect examination closed.

Signature waived.

Deposition closed.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, <i>Plaintiff,</i>	} In Equity No. 3056.
<i>vs.</i>	
P. Lorillard Company, <i>Defendant.</i>	

CERTIFICATE.

*Commonwealth of Massachusetts, County of Hampden, ss.*

I, Walter C. Ross, a Notary Public within and for the Commonwealth of Massachusetts, County of Hampden, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of Franklin G. Neal, Clement W. Kirkpatrick, Martin T. Huggard, Louis Isenberg, Adelard J. Landry, Robert N. Broughton, George L. Carlton, Michael O'Connor, Henry Le-Clair and Henry Butcher were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me, at Springfield, Massachusetts, beginning August 23, 1921; that each of the foregoing witnesses was by me duly sworn; that the tes-

timony of said witnesses was taken down in short-hand, under my supervision, by Minnie A. Hunter and W. F. O'Connor, stenographers well known to me, and thereafter reduced to typewriting; that the opposing party hereto was represented by Richard B. Cavanagh during the taking of said testimony; that the testimony was taken at the offices of Chapin & Neal, 387 Main street, Springfield, Mass., beginning at 12 o'clock noon, August 23, 1921, and ending August 24th, 1921; that the said deposition of each witness was read by said witness before signing the same, except where the signature of a witness was waived, as indicated on the deposition.

I am not connected by blood or marriage with either of the parties hereto, or interested either directly or indirectly in the matter in controversy.

I also further certify that I have been paid my fees as Special Examiner and for copies taken, in accordance with the attached bill, amounting to \$76.20.

In witness whereof, I have hereunto set my hand and official seal, this 25th day of August, 1921.

WALTER C. ROSS,  
Notary Public.

[SEAL.]

My commission expires April 16, 1922.

## UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company  
vs.  
P. Lorillard Company. } In Equity No. 3056.

Depositions taken on behalf of plaintiff at New Haven, West Haven, Milford and Hartford, Connecticut, before Herbert J. Krause, a notary public and Court Reporter, acting as Special Examiner by consent of counsel, pursuant to notice and by agreement of counsel, beginning August 29, 1921.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, for plaintiff; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, for defendant.

JOHN A. PETERS (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is John A. Peters; you are 52 years of age; your residence is 132 Thompson street, New Haven, Conn., and you are a salesman; is that correct?

A. Yes.

Q. 2. By whom are you employed, Mr. Peters; how long have you been employed by this concern, and in what capacity?

A. By the Beech-Nut Packing Co. since 1905, as a missionary and salesman, for about four years and three months, and as division manager in Connecticut since January 1st, a year ago, eleven years. I have been with them eleven years last January, last January, that's it.

Q. 3. In the course of your work for the Beech-Nut Packing Co., has that company, from time to time, come out with new products?

A. It has.

Q. 4. And have these products been always similar to previous products made by the Beech-Nut Packing Company?

A. No they weren't sometimes.

Q. 5. Can you give me an instance of what you mean by a product that is different from previous products?

A. Ginger ale and Beech-Nut gum are different than the products that we have previously put out like beef and peanut butter.

Q. 6. Do you remember when Beech-Nut chewing gum came out?

A. I think about ten years ago, I think it was.

Q. 7. And what was your experience with Beech-Nut chewing gum with respect to its sales?

A. Went off from the very start, the Beech-Nut name started it going, people tried it because it was Beech-Nut. I had no trouble selling it; in fact, we have been oversold on this product ever since nearly all the time.

Q. 8. What is the present situation with respect to Beech-Nut gum?

A. I am not supposed to accept or solicit orders for Beech-Nut gum.

Q. 9. When a man does order Beech-Nut gum and sends you the order, what do you do with it?

A. Forward it to the house.

Q. 10. And how much of his order does he get?

A. Well, we fill, I believe, about one-third of what he previously has been getting; we have been short ever since 1914, I believe; we got short and have been short ever since. He gets about one-third of what has previously been shipped.

Q. 11. How long ago did Beech-Nut ginger ale come out?

A. Why, I think between two and three years, nearly three years, I believe it is; I haven't the exact date.

Q. 12. And what was your experience in selling Beech-Nut ginger ale from the standpoint of its sales?

A. I had no trouble in selling it; everybody wanted to try it, because it was a Beech-Nut product.

Q. 13. Previous to coming out with Beech-Nut chewing gum, had the Beech-Nut Packing Company, to your knowledge, ever made a similar product?

A. Not that I know of.

Q. 14. Previous to coming out with Beech-Nut ginger ale, had the Beech-Nut Packing Company, to your knowledge, ever made a similar product?

A. No.

Q. 15. What has been your experience generally with respect to the selling of the various new Beech-Nut products which, from time to time, have come out?

A. It has been no trouble to put them down the first time, because everybody knew a Beech-Nut product; even a new man would go out and sell Beech-Nut goods; green men we call them.

Q. 16. And how are all these products marked?

A. With an oval label and Beech-Nut name at the top.

Q. 17. Mr. Peters, in your selling experience, what is the greatest sales instrumentality which you have encountered?

A. The Beech-Nut label.

Q. 18. When the Beech-Nut chewing gum was offered on the market, did you hear any comments, remarks or inquiries about it; if so, to what extent, and what was the nature of the remarks?

A. A great many people asked me how long we had been putting out chewing gum, how it was going, and if it was as good as the other products.

Q. 19. And did you hear that kind of remark frequently, or only a few times, or what?

A. Oh, plenty of times.

Q. 20. When Beech-Nut ginger ale was offered on the market, did you hear any comments, remarks or inquiries as you went about in your territory, about this product?

A. Why, the same inquiries that we had about the gum and other products—how long we had been putting it out, how it was selling, how the Beech-Nut Products would certainly make a good one. I sold a great many customers twenty-five case lots that I would probably not have sold more than one on account of its being a Beech-Nut product.

Q. 21. Were these twenty-five case lots the first sales?

A. The first sales, yes; I can give you several instances in this town where I sold twenty-five cases the first time.

Q. 22. When did the Beech-Nut cigarettes, similar to the package I now show you (Mr. Hinton showing witness a package of Beech-Nut cigarettes), which is in evidence in this case as Plaintiff's Exhibit No. 1, come on the market in this territory?

A. Why, I think I saw them this year first about either April or May; I think I saw them in Hartford first, although I am not sure.

Q. 23. Did you ever hear any comments, remarks or inquiries about these Beech-Nut cigarettes when they came on the market?

A. People asked me how long we were making cigarettes, how they were selling, and if they were as good as the other products.

Q. 24. I wish you would give me an estimate conservatively as to the number of times you have heard inquiries, comments or remarks of that kind and character since these cigarettes were first offered.

A. I should say five or six hundred times; in covering the whole State of Connecticut you hear a good many remarks.

Q. 25. Would you say that was a conservative estimate?

A. I should say it was.

Q. 26. Can you give me any special or particular instances of comments, remarks or inquiries of the character you have just mentioned? I want you to confine your answers to cases where you can state definitely where the remark was made, who made it, and just exactly what was said.

A. Well, about two weeks ago I was at S. D. Tendlers, wholesale candy people on George street, New Haven, and gave them all a stick of gum around. One of the men I gave it to said, "I don't want any gum, give me a Beech-Nut cigarette." I said, "Why do you ask me for a Beech-Nut cigarette?" He said, "Why, the Beech-Nut Packing Company make cigarettes, don't they, the same as the other goods?" I told him, "No," and he wanted to know how it was that they used our name.

Q. 27. Can you give any further instances?

A. Last Wednesday, when I was down in Milford, in front of Gardner's store, with Mr. Hinton, when I stopped the car and got out of the car, a man who was standing waiting for the trolley said, "Why don't you put out a near beer? The Beech-Nut Packing Company make nearly everything else and near-beer sure would sell." Mr. Hinton said to him, "What was the last product the Beech-Nut Packing Company put out?" He said a cigarette. This man's name is Harrison, and he has a clothing store in Milford; and another instance which happened about three weeks ago, but I don't know the man's name, happened in Waterbury. I was driving from Bank street into Center street when a man who stood on the curb looked at the name and then motioned me to stop, ran out on the street and came to the side of the car and asked me who to see



in regard to getting advertising for Beech-Nut cigarettes. He said he was a newspaper man. I said Beech-Nut cigarettes were not our product——

Q. 28. Just a minute, I don't want what you said particularly.

Mr. Cavanagh: Let him go on.

Q. 29. Well, go ahead.

A. He said he was a newspaper man and wanted the advertising. He didn't give me his name, and I didn't ask him.

Q. 30. You stated that you and I got out of a car in Milford, and also that a man called to you while you were driving your car in the instance you have just related. Is there any sign on that car?

A. There is a Beech-Nut sign on the door.

Q. 31. What do you mean by a Beech-Nut sign?

A. A copy of the trade-mark, containing the Beech-Nut label.

Q. 32. Do you know whether Beech-Nut scrap tobacco sells largely in this territory or not?

A. There is some of it sold here, not largely I should say.

Q. 33. Did you ever hear any comments, remarks or inquiries about Beech-Nut scrap tobacco?

A. A few times, when it first came out, they asked me about the making of Beech-Nut scrap tobacco, but not lately.

Q. 34. How does the Beech-Nut scrap tobacco sell in comparison, for instance, with chewing gum and other products of that character through this territory, do you know?

Mr. Cavanagh: That question is objected to as calling for an opinion on the part of the witness, who has not been shown in any manner qualified to answer.

Mr. Hinton: Question withdrawn.

Q. 35. To what extent have you seen Beech-Nut scrap tobacco displayed through this territory in comparison, for instance, with Beech-Nut cigarettes?

A. Well, in certain sections I have seen quite a little of it; in other sections I have seen hardly any of it.

Q. 36. Speaking generally, has the Beech-Nut scrap tobacco been displayed as much as the cigarettes?

A. Oh, no, not near.

Q. 37. I show you a photograph which I now mark for identification in this case as "Plaintiff's Exhibit No. 2, West Haven Drug Store Window Display," and ask you if you recognize the display shown in this photograph?

A. Yes, I saw that display myself.

Q. 38. Did you directly or indirectly have anything to do with putting that display of "Beech-Nut" gum boxes into that window?

A. No, I did not have anything to do with it. My first knowledge of it was when I saw it.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 39. As I understand it, you are division salesman for the Beech-Nut Packing Company?

A. In Connecticut, yes.

X-Q. 40. And how many years have you occupied that position?

A. Eleven years last January.

X-Q. 41. You say you have a Beech-Nut sign on your car?

A. Yes.

X-Q. 42. Will you just tell me the wording that appears on that sign; describe the sign in detail.

A. It says "Beech-Nut Packing Company" on it.

X-Q. 43. What sign is that?

A. On the car.

X-Q. 44. How long have you had that car?

A. Since—I have had the car since October, 1919, but I haven't had the sign on it all that time.

X-Q. 45. How long have you had the sign on it?

A. The sign was put on, well, about a year ago, I think.

X-Q. 46. Is that the car in which you drove Mr. Hinton from the Garde Hotel this morning?

A. The same one, yes.

X-Q. 47. That car has got a sign on it reading "Food Products," hasn't it?

A. I think it has, I didn't think of it before.

X-Q. 48. Never even took the trouble to notice it?

A. I didn't notice about the food products; it is an absolute fact, I didn't think of the food products when I spoke.

X-Q. 49. But you hadn't noticed it, had you?

A. I noticed the Beech-Nut Packing Company had it on there.

X-Q. 50. But you didn't notice the "Food Products" and have been driving the car for a year?

A. I didn't think of it.

X-Q. 51. When did you first notice these Beech-Nut cigarettes?

A. I think April or May.

X-Q. 52. 1920 or 1921?

A. 1921, yes, in the spring some time.

X-Q. 53. Do you smoke cigarettes?

A. No, very, very seldom.

X-Q. 54. Did you ever buy any of these Beech-Nut cigarettes?

A. I never bought any, I never smoked one.

X-Q. 55. But you never took a package in your hand, you never took the trouble to examine it, did you?

A. No, I don't think I have ever had a Beech-Nut package in my hand as far as I remember.

X-Q. 56. So it didn't occur to you, when you first saw this package, to examine it and see if it was made by the Beech-Nut Packing Company?

A. No, it didn't occur to me to examine it to see if it was made by the Beech-Nut Packing Company.

X-Q. 57. Just what is the procedure that is followed in informing you when the company brings out new products?

A. They usually notify me when they bring them out and send me a sample of the product. I usually get the new products before any of the other men.

X-Q. 58. Do they usually write you a notice?

A. They send me a letter.

X-Q. 59. So you didn't get any notice of the Beech-Nut cigarette from the Beech-Nut Packing Company?

A. I surely did not.

X-Q. 60. Do you know if the Beech-Nut Packing Company ever manufactured or marketed a tobacco product?

A. No.

X-Q. 61. Never heard of them putting out cigarettes?

A. No.

X-Q. 62. Or scrap tobacco?

A. No.

X-Q. 63. Whose name is on that package? (Mr. Cavanagh indicating Plaintiff's Exhibit No. 1.)

A. P. Lorillard & Co.

X-Q. 64. You don't find the Beech-Nut Packing Company's name anywhere on it, do you?

A. No, I do not.

X-Q. 65. If you went into a store and wanted to

purchase a package of Beech-Nut chewing gum or a bottle of Beech-Nut ginger ale, would you be confused or deceived into taking a package of Beech-Nut cigarettes in place of the gum or ginger ale?

A. If I asked for chewing gum would I take cigarettes?

X-Q. 66. Yes.

A. No, if I asked for gum I wouldn't take cigarettes.

X-Q. 67. Do you think a man who asked for gum would take cigarettes?

A. Why, a man who asked for cigarettes wouldn't take gum, no.

X-Q. 68. Or if he had asked for a jar of peanut butter he wouldn't take a jar of bacon?

A. Not unless he is a fool.

X-Q. 69. You spoke of the amount of scrap tobacco displayed in this territory, Lorillard scrap tobacco and Lorillard cigarettes. As a matter of fact, you don't know anything about the Lorillard business; what they do in Beech-Nut scrap tobacco or Beech-Nut cigarettes, do you?

A. I see the cigarettes in nearly all the stores that I go into where they have candy and tobacco. Now and then I see some scrap tobacco.

X-Q. 70. You don't know how much scrap tobacco Lorillard sells?

A. Absolutely nothing, I don't know anything about the Lorillard business whatever.

X-Q. 71. You say that during the course of conversation you had with some party, he asked you for a Beech-Nut cigarette when you offered him gum?

A. He did.

X-Q. 72. He said substantially, "I don't want the gum, but you can give me Beech-Nut cigarettes"?

A. He said, "I don't want the gum, give me a Beech-Nut cigarette."

X-Q. 73. What did you say?

A. Why do you ask me for Beech-Nut cigarettes?

X-Q. 74. What did he say?

A. The Beech-Nut Company put out Beech-Nut cigarettes.

X-Q. 75. What did you say?

A. I said, "You think so?" He said, "Sure." I said, "They do not," and then he wanted to know what right they had to use our label.

X-Q. 76. Then you informed him that the Beech-Nut Packing Company did not put out cigarettes?

A. Yes.

X-Q. 77. As far as you know, the Beech-Nut people had never put out a cigarette?

A. As far as I know.

X-Q. 78. That Beech-Nut label I asked you about; that is the one with the wide red band?

A. The Beech-Nut is an oval label and has Beech-Nut on it.

X-Q. 79. What else?

A. Well, it has a beech-nut with leaves, I think, below the name.

X-Q. 80. And it has a wide red band, has it not?

A. I think it has a red band.

X-Q. 81. And it has got printing on that red band?

A. I don't know if it has printing on a red band or a white band, I couldn't tell you.

X-Q. 82. The Beech-Nut Packing Company also sells other goods—other food products—but not under the Beech-Nut label to which you have just referred, does it not?

A. What do you mean?

X-Q. 83. I mean they have other brands of goods, food products, which the Beech-Nut Packing Company sells and upon which they do not use the Beech-Nut label which you have described generally?

A. They don't use Beech-Nut on the oval. They don't have it on the oval.

X-Q. 84. No, they don't have the oval with the word "Beech-Nut"?

A. I don't know, I can't think of any that don't have the oval labels that I have ever seen. There is some beef.

X-Q. 85. You mean Erie beef?

A. Erie Beef and Holly Beef.

X-Q. 86. They have a Mohawk brand, have they not?

A. They haven't got that in this part of the country, they have that in other territories. I don't think they have the name on it although they may, I couldn't say.

X-Q. 87. But they have the Erie brand and the Holly brand?

A. Yes, they have the Erie brand and the Holly brand.

X-Q. 88. And those are not sold under the Beech-Nut label?

A. No.

X-Q. 89. Beech-Nut is put on the better brand of goods?

A. Yes.

X-Q. 90. But does the words "Beech-Nut Packing Company" appear on those brands?

A. I think so.

Mr. Cavanagh: I think that is all.

Signature of witness waived.

Deposition closed.

## STIPULATION.

It is stipulated by and between the parties, through their respective counsel, that if JEROME F. CARNEY was called, he would testify as follows:

I am of legal age and reside at 289 Dwight Street, New Haven, Connecticut. I am a university student, at present on my vacation. I know the people in a cigar store on Dwight Street, New Haven, Connecticut, and have spent considerable time there recently during my summer vacation. I have seen the Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1, displayed in that and other stores. I have seen posters of these Beech-Nut cigarettes and the advertising in the newspapers about these cigarettes. I always believed that these cigarettes were a product of the Beech-Nut Packing Company, the same people who put out the chewing gum, bacon and other products. I was led to this belief by the appearance of the package.

I do not now believe that these cigarettes were made by the Beech-Nut Packing Company because I was told on August 24th, 1921, by Mr. Griffin, the salesman for the Beech-Nut Packing Company, that the Beech-Nut Packing Company had nothing to do with these cigarettes. I had never seen a package of the Beech-Nut scrap chewing tobacco before until I was shown one on August 25th, 1921.

On cross-examination by Mr. Cavanagh it is stipulated that the witness would testify as follows:

I have never purchased a package of Beech-Nut cigarettes or Beech-Nut scrap tobacco. I never examined a package of Beech-Nut cigarettes and therefore did not notice the name "P. Lorillard Co." which appears thereon, as I now see it does, and I have been informed by the Beech-Nut salesman, Mr. Griffin, that the Beech-Nut



Packing Company has nothing to do with the manufacture or marketing of these Lorillard Beech-Nut cigarettes. I would not confuse Beech-Nut chewing gum with Lorillard Beech-Nut cigarettes, nor be deceived into accepting the one product for the other.

#### STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if MARY W. GREGORY were called, she would testify as follows:

I am the wife of Mr. Gregory, who keeps a grocery store in Milford, Connecticut, and I work in the store. This store is a general grocery store and handles tobacco products. We do not handle Beech-Nut cigarettes. I have seen the Beech-Nut cigarettes advertised and I have seen them displayed in various windows and I always believed that they were a Beech-Nut Packing Company product, made by the same people who make the chewing gum and other products, until August 25th, 1921, when I was told by Mr. Hinton that these cigarettes were not a Beech-Nut Packing Company product. I have never seen a package of Beech-Nut scrap tobacco until Mr. Hinton showed me one on the date mentioned.

On cross-examination it is stipulated that the witness would testify as follows:

We do not sell Beech-Nut cigarettes in our store, nor do we handle the same. I have never purchased a package of Lorillard Beech-Nut cigarettes, have never made any particular examination thereof and therefore did not note the name P. Lorillard Co. appearing on the package.

I would not confuse chewing gum with Lorillard Beech-Nut cigarettes, nor be deceived into accepting the one product for the other.

JAMES J. CASHMAN, JR. (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is James J. Cashman, Jr., your age is 23, your occupation is a drug clerk and your place of business is 615 Howard Avenue, New Haven, Conn. Is that correct?

A. Yes.

Q. 2. Do you sell tobacco products in this drug store, Mr. Cashman?

A. Yes.

Q. 2a. When did you first see Beech-Nut cigarettes, similar to the package I now show you, which is in this case as Plaintiff's Exhibit No. 1? (Mr. Hinton shows witness Plaintiff's Exhibit No. 1.)

A. About April.

Q. 3. Did you put these cigarettes in this store for sale?

A. Yes.

Q. 4. Did you personally sell these cigarettes to customers?

A. Yes.

Q. 5. Did you take them out of the case or off the shelf and hand them to the customers?

A. Yes.

Q. 6. When you first saw these cigarettes, by whom did you think they were made?

A. The Beech-Nut Gum Company.

Q. 7. How long did you continue to believe that these cigarettes were made by the Beech-Nut gum people?

A. About a month or six weeks.

Q. 8. And during this month or six weeks were you selling the cigarettes over the counter?

A. Yes.

Q. 9. When were you first advised that these cigarettes were not made by the Beech-Nut gum people?

A. Why, I asked Mr. Griffin how long since he has been putting out cigarettes and he told me they were not putting out cigarettes. He said they had nothing to do with it.

Q. 10. Who is Mr. Griffin?

A. He is a salesman for the Beech-Nut people.

Q. 11. And what does he sell?

A. Beech-Nut gum and candy.

Q. 12. Have you ever seen a package of Beech-Nut scrap tobacco before I showed you this package the other day? (Mr. Hinton showed the witness a package of Beech-Nut chewing tobacco.)

A. No.

Q. 13. I call your attention to an oval brand on this package, which is marked in this case Defendant's Cross-Exhibit No. 1. Do you recognize that brand; if so, will you state what it is?

A. The same label as on Beech-Nut gum, on the gum.

Q. 14. That's all.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 15. I notice you have a candy counter and a cigar counter and they are both separated by the soda counter?

A. Yes.

X-Q. 16. You handle the gum at the candy counter, do you not, and you handle the cigarettes at the cigar counter near the front of the store?

A. Yes.

X-Q. 17. I also note that you have a show window,

which is completely dressed or filled with advertising of tobacco products?

A. Yes.

X-Q. 18. And I notice these products that are advertised in the windows are Beech-Nut cigarettes, Murad cigarettes, Mogul cigarettes and other products. Did you ever hear of the P. Lorillard Co.?

A. Yes, sir.

X-Q. 19. Did you ever buy goods from the P. Lorillard Co.?

A. Not directly, indirectly.

X-Q. 20. But you knew you were buying their goods?

A. Yes, yes.

X-Q. 21. And that window is practically dressed with P. Lorillard Company's goods, is it not?

A. If those cigarettes are made by those people. Those are Anargyros, is it Lorillard?

X-Q. 22. What is that cigarette you named?

A. Murad is made by Anargyros.

X-Q. 23. You don't buy tobacco yourself here, do you?

A. Yes, yes.

X-Q. 24. Did you ever smoke Beech-Nut cigarettes?

A. Yes, I have smoked them the other day for the first time.

X-Q. 25. But that was after you knew they were made by P. Lorillard Co., was it not?

A. He didn't tell me who they were made by, but he gave them to me the other day.

X-Q. 26. Did you ever take the trouble to examine a package of Beech-Nut cigarettes?

A. No, I didn't.

X-Q. 27. Never even glanced at them?

A. No, I didn't.

X-Q. 28. Never took the trouble to examine the package at all?

A. I never took the trouble to look at any of them. On the Murads the name is quite plain. I am quite sure I think S. Anargyros is on there.

X-Q. 29. But if you had noticed that name on there you would have noticed the name P. Lorillard on it, would you not?

A. Yes, I would.

X-Q. 30. And that would indicate that was a package of the P. Lorillard Company's tobacco?

A. Yes.

X-Q. 31. If you took the trouble to examine the package?

A. Yes.

X-Q. 32. I think you testified substantially that the label on the Beech-Nut scrap tobacco was like the label on the chewing gum?

A. As far as I remember.

X-Q. 33. Will you look at those two (Mr. Cavanagh indicating a package of Beech-Nut scrap tobacco and a package of Beech-Nut chewing gum)? Do you see on the Lorillard scrap tobacco package that red band that appears on the Beech-Nut gum package?

A. No.

X-Q. 34. And the red band oval on the Beech-Nut package has printing on it, has it not?

A. Yes.

X-Q. 35. And that is not on the single line oval of the package?

A. No.

X-Q. 36. And the beech-nuts in the center are not the same, are they?

A. No.

X-Q. 37. And you don't know of any gum package or any other Beech-Nut product package that has those red radiating lines like a sunburst, do you?

A. No, I do not.

X-Q. 38. And the name "Lorillard" appears on the Beech-Nut package?

A. Yes.

X-Q. 39. And that would indicate to you that is a product of the tobacco people, the Lorillard people, would it not?

A. Yes.

X-Q. 40. If a customer of yours came into this store and asked for a package of this Beech-Nut chewing gum, would you sell him a package of these Beech-Nut cigarettes in its place?

A. No.

X-Q. 41. And would you yourself, if you wished to purchase a package of Beech-Nut chewing gum, be confused or deceived into accepting a package of these Lorillard Beech-Nut cigarettes or a package of Lorillard Beech-Nut chewing tobacco in the place of chewing gum?

A. Not if I asked for chewing gum, no.

X-Q. 42. You would think a person was crazy that would confuse the two, do you not?

A. Yes, as far as I was concerned.

Signature of witness waived.

Deposition closed.

EDWARD J. GLYNN (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Q. 1. Your name is Edward J. Glynn, your age 24, you are a clerk by occupation and your residence is 630 Campbell Avenue, West Haven, Connecticut, is that correct?

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A. Yes, sir.

Q. 2. Have you ever seen Beech-Nut cigarettes like the package I now show you (Mr. Hinton shows witness a package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1?

A. I have.

Q. 3. When did you first see these cigarettes that you remember?

A. Quite a while ago. A year or so, in the spring—last spring—sometime, I guess it was.

Q. 4. Did you ever buy and smoke any of these cigarettes?

A. I did.

Q. 5. When did you buy this first package of these cigarettes?

A. I don't remember just what store it was.

Q. 6. When?

A. Last spring, I guess.

Q. 7. Have you subsequently bought other packages?

A. Yes.

Q. 8. Why did you buy these cigarettes last spring?

A. Because they were Beech-Nut cigarettes, I thought they were made by this company, the Beech-Nut Company.

Q. 9. Have you purchased other Beech-Nut products?

A. Yes, and sold Beech-Nut products besides.

Q. 10. What has been your experience with the Beech-Nut products which you have bought; have they been satisfactory?

A. Absolutely in every way.

Q. 11. Do you know why you believed that these cigarettes were a Beech-Nut product?

A. Well, they are Beech-Nut brand. I thought they were the Beech-Nut brand, I think it is now, that is, it appears to be to me.

Q. 12. Do you now believe these cigarettes were put out by the Beech-Nut Packing Company?

A. No, I do know now that they are not.

Q. 13. When did you first find out they were not put out by the Beech-Nut Packing Company?

A. Last week when Mr. Green told me.

Q. 14. What did he tell you?

A. He told me they were not made by the Beech-Nut Company. And Friday or Saturday I bought a package to see who they were made by, but I didn't know then, I didn't know they were made by Lorillard, but I do now.

Q. 15. Did you find out when, as you have stated, you bought these cigarettes in the spring of this year in the belief that they were a Beech-Nut product, did you find that they came up to the standard of quality which you expected of a Beech-Nut product?

A. No, I did not.

Q. 16. Do you know the name of some brands of cigarettes which would seem to you to come up to the Beech-Nut standard of quality more than the Beech-Nut cigarettes?

A. Pall Mall, Philip Morris, or any good quality of cigarettes.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 17. Mr. Glynn, when did you buy your first package of Beech-Nut cigarettes about?

A. Well, I couldn't give you any exact date you know.

X-Q. 18. Approximately.

A. Last spring, I guess it was.

X-Q. 19. When did you buy your last package?

A. The last package I bought Saturday, Friday or



Saturday, to find out who they were made by, that's all. I was always under the impression that these cigarettes were made by the Beech-Nut Company.

X-Q. 20. And how frequently, from the time you first bought them and last Saturday did you purchase these cigarettes?

A. I only bought one or two packages.

X-Q. 21. Did you ever hear of P. Lorillard Company?

A. I have.

X-Q. 22. They are a large tobacco concern, are they not?

A. I knew they made Level Head.

X-Q. 23. They are large tobacco manufacturers?

A. I don't know how large they are, I know they made Level Head.

X-Q. 24. Did you ever hear of Climax Plug tobacco, chewing tobacco?

A. I have seen it, yes, in red tin boxes.

X-Q. 25. When you first purchased that package of cigarettes (Mr. Cavanagh showing witness package of Beech-Nut cigarettes), did you look on it to see whose name was on it?

A. I did not.

X-Q. 26. If you had looked at that package you would have seen the Lorillard name on it, wouldn't you?

A. I presume I would if I had looked at the package, but I didn't look at the package, I looked at the Beech-Nut.

X-Q. 27. You didn't take the trouble to examine the package?

A. No, I didn't.

X-Q. 28. Had you looked at it, you would have seen the Lorillard name?

A. Yes, I presume so.

X-Q. 29. Do you know that the P. Lorillard Company have been in the tobacco business for many years?

A. No, not for many years; I knew they made Level Head.

X-Q. 30. How long do you know that they had been in the tobacco business, to your own knowledge?

A. Why, I should say around—well, six years. I worked in a grocery store and I seen the name.

X-Q. 31. You never heard of the Beech-Nut Packing Co. putting out any tobacco products?

A. No.

X-Q. 32. But you know Lorillard did put them out?

A. Yes.

X-Q. 33. But when purchasing tobacco, you prefer to purchase tobacco from a concern in the tobacco business rather than one in the food business?

A. Not absolutely.

X-Q. 34. Wouldn't you think they would know more of the tobacco business?

A. I would presume so.

X-Q. 35. Now, if you went into a store and wanted to purchase some Beech-Nut chewing gum or Beech-Nut bacon, would you be confused into taking a package of these Lorillard cigarettes instead of chewing gum or bacon? If a man tried to palm off on you cigarettes in the place of chewing gum or bacon would you be confused into taking cigarettes for gum or bacon?

A. Absolutely not.

X-Q. 36. You think a man would be crazy to do that?

A. I know if it said cigarettes on it, it wouldn't be bacon.

X-Q. 37. And you think a man who would take cigarettes for bacon would be crazy?

A. Yes, I would.

X-Q. 38. Now, you said a good cigarette was something along the line of Pall Malls or Philip Morris?

A. Yes.

X-Q. 39. Do you know what Pall Malls sell for?

A. Yes.

X-Q. 40. What is the price?

A. I think 25 cents.

X-Q. 41. Are there twenty in a package of Pall Malls?

A. Either ten or twelve.

X-Q. 42. Philip Morris about the same; are they a 25-cent cigarette?

A. Yes.

X-Q. 43. What did you pay for Beech-Nut cigarettes?

A. Fifteen cents.

X-Q. 44. And there are twenty in a package?

A. Yes.

X-Q. 45. Now, you didn't expect to get the same grade of cigarettes at the rate of twenty for fifteen cents as you would when you paid twenty-five cents for ten, would you?

A. Well, I don't know as I would, I wouldn't expect to get the same grade; I would expect to get a good quality if it has got that brand on it.

X-Q. 46. You have heard of the Hanan shoe, haven't you?

A. No, I haven't.

X-Q. 47. What high price shoe have you heard of?

A. High priced shoes?

X-Q. 48. Yes.

A. You mention some of them.

X-Q. 49. French, Shriner and Earner?

A. No.

X-Q. 50. Name a high priced shoe.

A. Well, the Walk-Over, you call that a high priced shoe or good quality shoe.

X-Q. 51. For instance, there is a Hanan shoe that costs twenty dollars. I don't know how high a Walk-Over shoe goes.

A. I see.

X-Q. 52. Well, I will put it like this. You know that manufacturers of high grade goods also have brands they sell of cheaper materials and of an inferior grade?

A. I don't know as to that.

X-Q. 53. You know a manufacturer has high grade goods and also lower grade goods?

A. Yes.

X-Q. 54. Yes. Do you mean to say he would sell the lower grade for the higher price goods?

A. No.

X-Q. 55. You take a Hanan shoe, for example, you can get a pair of Hanan shoes for \$20 and you can get a pair of Hanan shoes for \$16.

A. I see.

X-Q. 56. You can get a pair of Hanan shoes for \$14.

A. Yes.

X-Q. 57. You know that it is customary in the trade for a man to charge different prices for his goods under different brands?

A. Yes.

X-Q. 58. In other words, you wouldn't expect to get a Packard automobile at the same price as a Ford?

A. No.

Mr. Cavanagh: I think that is all.

Cross-examination closed.

*Re-Direct Examination by Mr. Hinton.*

R-D. Q. 59. Have you ever seen the Beech-Nut brand on any product put out by the Beech-Nut Company that was not a high quality product?

A. No.

Signature of witness waived.

Deposition closed.

ROBERT G. GREENE (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Q. 1. Your name is Robert G. Greene, your age is 49, and your occupation is the meat and grocery business at 735 Washington Avenue, West Haven, Connecticut. Is that correct?

A. Yes, sir.

Q. 2. I show you a package of cigarettes, which is in evidence in this case as Plaintiff's Exhibit No. 1. (Mr. Hinton showed witness package of Beech-Nut cigarettes.) Have you ever seen these cigarettes displayed or advertised in this town?

A. I have seen them advertised and displayed by a carton about that long (indicating) in the windows of stores.

Q. 3. When did you first see these cigarettes advertised?

A. About two months ago.

Q. 4. When you first saw these cigarettes advertised, by whom did you think they were made?

A. By the Beech-Nut Company.

Q. 5. Why?

A. The initials were the same, the letters were the same as the Beech-Nut product people, that is what drew my attention to the cigarettes, the letters looked so much like the other.

Q. 6. You refer to this oval device that is on the cigarette?

A. The oval device, yes.

Q. 7. How long did you continue to believe this the product of the Beech-Nut Packing Company?

A. Until I saw Peters about a month ago.

Q. 8. Who is Mr. Peters?

A. Drummer for the Beech-Nut Product Company.

Q. 9. Did he tell you that the Beech-Nut Product Co. did not make these cigarettes?

A. He said they had a suit against them now.

Q. 10. That's all.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 11. Do you sell tobacco, Mr. Greene?

A. No.

X-Q. 12. You do not handle Beech-Nut chewing tobacco?

A. No.

X-Q. 13. Did you ever see a package of it?

A. No.

X-Q. 14. You didn't look to see if the name Lorillard was on it?

A. No, I don't smoke.

X-Q. 15. Didn't you look at the cigarette package or advertising to see if the name Lorillard was on it?

A. No, all I see was Beech-Nut.

X-Q. 16. I show you a package of the Beech-Nut brand of chewing gum (Mr. Cavanagh showed the witness a package of Beech-Nut chewing gum). That has got a red oval on it?

A. Yes.

X-Q. 17. That has got a Beech-Nut leaf in the center?

A. Yes.

X-Q. 18. That has got a double beech-nut?

A. Yes.

X-Q. 19. If you went into a store and wanted to purchase some Beech-Nut chewing gum or Beech-Nut food

product, would you be confused or deceived into accepting a package of cigarettes in place of the gum?

A. I wouldn't, no, because I am experienced in the business myself.

X-Q. 20. You wouldn't confuse chewing gum with tobacco?

A. No.

X-Q. 21. You wouldn't confuse a tobacco product, such as cigarettes, with chewing gum or a food product, would you?

A. What do you mean, I wouldn't confuse chewing gum with cigarettes?

X-Q. 22. You wouldn't accept one for the other?

A. Oh, no, absolutely not.

Witness of signature waived.

Deposition closed.

NATHAN HAMMERMAN (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Q. 1. Your name is Nathan Hammerman, your age is 29, your occupation is a drug clerk, is that correct?

A. Yes.

Q. 2. Where is your drug store located?

A. 1235 Whitney Avenue.

Q. 3. I show you a package of cigarettes (Mr. Hinton showed witness a package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1. Have you sold these cigarettes in your store; if so, how long have you sold them?

A. I don't know, about six months, I guess. No, I don't know, about four months they have been out, haven't they?

Q. 4. When you first sold these cigarettes in your store, by whom did you think they were made?

A. The Beech-Nut people.

Q. 5. Can you name any other products made by these Beech-Nut people?

A. Peanut butter, popcorn, gum, that's about all. I know they make a whole line, but don't know all of them.

Q. 6. How long did you continue to believe that these cigarettes were made by the Beech-Nut people?

A. About two months.

Q. 7. Do you now believe they were made by the Beech-Nut people?

A. No.

Q. 8. How did you first find out they were not?

A. Some one come in and told me you people were suing the people who put them out. I don't know his name.

Q. 9. In this period of two months that you believed these cigarettes were made by the Beech-Nut people, did you sell them yourself to customers over the counter?

A. Oh, yes, surely.

Q. 10. Did you take them out of that—those shelves and hand them to the customers? (Mr. Hinton indicated.)

A. Yes.

Q. 11. Have you ever heard customers make remarks about Beech-Nut cigarettes to you over the counter; if so, what kind of remarks did they make, if you remember?

A. Just that they thought—that they wanted to know if the Beech-Nut people were putting out cigarettes, they wanted to know how long since the Beech-Nut people went into the tobacco business. I sell quite a lot of it now. It is the biggest 15 cent seller we got.



Q. 12. What did you tell customers who made remarks of this kind to you?

A. I guessed they were because I didn't know.

Q. 13. Did you ever have customers purchase gum in this store and ask for just Beech-Nut?

A. Yes.

Q. 14. And what did you do then?

A. I don't know, I always asked them whether they wanted the gum or cigarettes.

Q. 15. How often did this happen?

A. Every day now; well, not so much now because people kind of got hip to it, but up to a month ago anyhow.

Q. 16. You mean when you say they got hip to it you mean they have got hip to the fact that there are both cigarettes and gum?

A. Both cigarettes and gum, that is what I mean.

Q. 17. Do you know what caused you to believe that these cigarettes were made by the Beech-Nut people?

A. The name.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 18. From whom do you buy your Beech-Nut cigarettes?

A. All the tobacco jobbers, the New Haven Tobacco Co., Cozzilano down there on College Street. They buy through Anthony Pepe.

X-Q. 19. On this Plaintiff's Exhibit No. 1 (Mr. Cavanagh showed the witness a package of Beech-Nut cigarettes), you notice the name P. Lorillard on it, don't you?

A. I do now that you have called my attention to it.

X-Q. 20. You never did before?

A. I never took the trouble to examine it.

X-Q. 21. I understand you are still buying those Beech-Nut cigarettes?

A. Yes, sir.

X-Q. 22. You have heard of P. Lorillard Co.?

A. Yes, sir.

X-Q. 23. They are a large tobacco concern?

A. Yes.

X-Q. 24. That name would naturally indicate to you that it was their product?

A. Yes, it would, if I had gone to the trouble to look at it I would have known it; otherwise I wouldn't know whether they were putting it out for the Beech-Nut people.

X-Q. 25. But you noticed the Lorillard name on the product?

A. Yes, but I never did before.

X-Q. 26. You don't find any Beech-Nut Packing Company on it, do you?

A. No, but I would have to look at it, to tell the truth.

X-Q. 27. You have purchased lots of other Lorillard products?

A. Oh, yes.

X-Q. 28. And you naturally presumed, being in the tobacco business, that that was a Lorillard brand?

A. No.

X-Q. 29. Not even with the name on it?

A. I do now, I see the name on it.

X-Q. 30. Since you have found out that it was not the Beech-Nut Packing Company's cigarette, you have still been purchasing it, haven't you?

A. Sure.

X-Q. 31. You said it was a good seller?

A. Yes, better, if anything, than it was.

X-Q. 32. You have quite a demand for it?

A. Yes, it is the biggest 15-cent seller we have.

X-Q. 33. You never deliberately had a customer come in and ask you for the Beech-Nut cigarette of the Beech-Nut Packing Company, and you deliberately sold him a Lorillard cigarette of the Beech-Nut brand?

A. No.

X-Q. 34. And you never had a customer come in this store and ask you for Beech-Nut chewing gum, and in place of Beech-Nut gum you have handed him cigarettes?

A. Oh, yes.

X-Q. 35. You have?

A. Oh, yes.

X-Q. 36. You have?

A. He asked for Beech-Nut, and I gave him a pack of Beech-Nut gum, because Beech-Nut gum is a whole lot better known than the cigarette.

X-Q. 37. My question was this: If a customer asked you for Beech-Nut gum you would not palm off a package of cigarettes in place of the gum?

A. Oh, no.

X-Q. 38. You would think the man was crazy to take it?

A. I wouldn't think very much of him, I probably would think I was much more crazy for giving it to him.

X-Q. 39. You yourself wouldn't be confused in buying Beech-Nut cigarettes when you wanted Beech-Nut gum?

A. Oh, no, if I know what they came in for, and know what they was after. Anyway, it is up to you people to take care of your trade-mark, not me.

Signature of witness waived.

Deposition closed.

JAMES J. MARRINAN (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Q. 1. Your name is James J. Marrinan; your age is 25; your residence is 228 Blatchley avenue, New Haven, Conn., and your occupation is a drug clerk; is that correct?

A. Yes, sir.

Q. 2. What is the name of this drug store in which you are now employed?

A. W. A. Hussion.

Q. 3. How long have you been in the drug business?

A. Nine years.

Q. 4. Have you, in that time, been selling to customers over the counter?

A. Yes, yes.

Q. 5. I show you a package of cigarettes (Mr. Hinton showed witness package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1. When did you first see these cigarettes or see them advertised; do you remember?

A. Early in the spring of this year.

Q. 6. When you first saw these cigarettes and saw them advertised, by whom did you believe they were made?

A. The Beech-Nut people.

Q. 7. Can you name other products made by the Beech-Nut people?

A. Gum, ginger ale, peanut butter and bacon; I see that advertised.

Q. 8. Do you now believe these cigarettes are made by the Beech-Nut people?

A. No, no.

Q. 9. How did you first find out these cigarettes were not made by the Beech-Nut people?

A. I inquired of Mr. Griffin and he told me they were not made by the Beech-Nut people.

Q. 10. Who is Mr. Griffin?

A. Salesman for the Beech-Nut people.

Q. 11. I notice you have in this store a rack or set of shelves for cigarettes, containing cigarettes.

A. Yes.

Q. 12. And a shelf immediately below the rack there, forming part of the same cabinet, and on this shelf immediately adjacent to the cigarettes is the display of ginger ale.

A. That isn't on display; that will be put out of there in five minutes.

Q. 13. It is there now?

A. Yes.

Q. 14. Ginger ale, seeded raisins, Beech-Nut chewing gum, etc.; is that right?

A. Yes, that's right.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 15. Next to your tobacco rack or shelving this wall forms a continuation of the shelving, and you have on it pharmaceutical preparations and packages like patent medicines?

A. Patent medicines; that is what it is.

X-Q. 16. And your chewing gum is directly under the patent medicine counter?

A. Yes.

X-Q. 17. And it is not your tobacco counter?

A. No.

X-Q. 18. And your cigarette shelves are in line with your cigar counter?

A. Directly in back of it.

X-Q. 19. Directly in back of it; and your pharmaceutical shelves with your chewing gum, is back of your candy counter?

A. Yes, and here are three boxes of gum behind this case here.

X-Q. 20. What gums are these?

A. Apollo, Peppermint and Beeman's. The Peppermint and double mint is in back of it.

X-Q. 21. But the Beech-Nut chewing gum is not in the cigarette case?

A. No.

X-Q. 22. And your pharmaceutical preparations are on this shelf?

A. I call it the ledge.

X-Q. 23. They are on the ledge?

A. Yes, sir.

X-Q. 24. Did you ever hear of P. Lorillard Co.?

A. Yes, sir.

X-Q. 25. They are large tobacco manufacturers, are they not?

A. So I understand.

X-Q. 26. How long have you been buying Beech-Nut cigarettes?

A. I never bought them myself.

X-Q. 27. You never yourself bought a package of Beech-Nut cigarettes?

A. No.

X-Q. 28. How long have you been buying them here in the store, four or five months?

A. I have been out of here, I have been out of here nine months; I came back a month ago.

X-Q. 29. Yes. So they have been buying them since you came back?

A. They were here when I came, so I take it for

granted they were buying them for the last two or three months.

X-Q. 30. Are you buying them yet?

A. Yes, they are still selling them, they are here on the counter.

X-Q. 31. You have sold them over the counter?

A. Yes.

X-Q. 32. The name P. Lorillard Co. would naturally indicate to you a Lorillard product?

A. Yes.

X-Q. 33. You never heard a person come in here and ask for a package of Beech-Nut cigarettes made by Beech-Nut Packing Co., have you?

A. No.

X-Q. 34. If a person came into this store and asked you for a package of chewing gum made by the Beech-Nut Packing Company, that is, the Beech-Nut chewing gum, you wouldn't sell him a package of Beech-Nut cigarettes for a package of chewing gum?

A. In New Haven, no.

X-Q. 35. You would think he was crazy if he took it?

A. Yes, sure.

X-Q. 36. Well, if you went into a store and wanted a package of Beech-Nut cigarettes, you wouldn't be confused or deceived into taking a package of Beech-Nut chewing gum for Beech-Nut cigarettes?

A. No.

X-Q. 37. As I understand it, you never smoked Beech-Nut cigarettes?

A. No.

X-Q. 38. And you didn't examine the package?

A. No, not until the other day.

X-Q. 39. And you saw the name P. Lorillard Co. on it?

A. Yes.

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 40. Was this examination made after your attention had been called to it?

A. After my attention had been called to it, yes.

Signature of witness waived.

Deposition closed.

T. J. BRANIGAN (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is T. J. Branigan; you are employed in a shoe store at 1022 Chapel street, New Haven, Connecticut; you are 24 years of age, and your residence is 182 Wolcott street, New Haven, Connecticut; is that correct?

A. Yes.

Q. 2. I show you a package of Beech-Nut cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1. Have you ever seen these cigarettes before on advertisements or posters of them; if so, when did you first see them?

A. It was last spring when they first came out I saw them displayed.

Q. 3. Did you ever buy a package of these cigarettes?

A. Yes, one package.

Q. 4. Why did you buy those cigarettes?

A. I thought they were a Beech-Nut product.

Q. 5. Had you previously bought Beech-Nut products?

A. Yes.

Q. 6. And what had been your experience with Beech-Nut products?

A. Very good.



Q. 7. What Beech-Nut products do you remember having bought prior to having bought the cigarettes?

A. Gum and caramels.

Q. 8. Do you know why you believed these cigarettes were a product of the Beech-Nut people when you bought them?

A. I saw the Beech-Nut name on them.

Q. 9. How long did you continue to believe that these cigarettes were a product of the Beech-Nut people?

A. Until about two weeks ago.

Q. 10. How did you first find out they were not?

A. I met Mr. Griffin one day and he gave me a sample of the gum, and I asked him for a sample of the cigarettes, and he informed me then that they weren't a Beech-Nut product.

Q. 11. Did these Beech-Nut cigarettes that you bought in the belief that they were made by the Beech-Nut people, come up to your expectations as to quality?

A. No, they didn't.

Q. 12. Did you ever buy any more Beech-Nut cigarettes after that first package?

A. No, I didn't.

Q. 13. Mr. Branigan, you have testified that these cigarettes came out in the spring, that you saw them advertised or displayed and that you bought a package of them. Can you give me an idea to what extent you saw the cigarettes advertised and displayed in the store windows between the spring and the time Mr. Griffin told you they were not the product of the Beech-Nut Packing Company?

A. I saw them on billboards and displayed on quite a few store windows, dummy boxes and like all different types of advertising.

Q. 14. Were these dummy boxes similar to these boxes of cigarettes that I have shown you?

A. Why, no, I can't say they were. I don't remember the dummy boxes very well.

Q. 15. What I mean is, were they dummy packages of cigarettes?

A. Yes, about like that.

Q. 16. And did you see posters and the like in the windows?

A. Yes.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 17. Do you smoke cigarettes?

A. A great deal.

X-Q. 18. What brands do you use?

A. Mostly Lucky Strikes.

X-Q. 19. Did you ever smoke any Murads?

A. Yes, quite a lot.

X-Q. 20. Moguls?

A. Moguls, yes.

X-Q. 21. And Egyptian Deities?

A. Yes.

X-Q. 22. Those are all good brands, are they not?

A. Very good.

X-Q. 23. They are made by P. Lorillard Co.?

A. I never looked to see who they were made by.

X-Q. 24. Did you ever hear of P. Lorillard Co.?

A. Yes.

X-Q. 25. They are large manufacturers of tobacco products, are they not?

A. Yes.

X-Q. 26. If I tell you that they make those brands I have mentioned—Murads, Moguls, Egyptian Deities, you know Lorillard makes a good cigarette, don't you?

A. Yes.

X-Q. 27. And you also know, as a smoker, that differ-

ent people have different tastes as to tobacco—cigars and cigarettes?

A. Yes.

X-Q. 28. You know what you might consider to be a high grade brand, another man might consider very poor and inferior, do you not; that is true, isn't it?

A. Yes, sir.

X-Q. 29. So it is a matter of individual taste in cigarettes?

A. Absolutely.

X-Q. 30. Did you notice the name P. Lorillard Co. on this package of Beech-Nut cigarettes (Mr. Cavanagh indicating)?

A. I have noticed it in the past week or so.

X-Q. 31. You never took the trouble to examine that pack of cigarettes to see who did produce it, did you?

A. Never.

X-Q. 32. And when you were looking at all these advertisements and displays you never took the trouble to see whose name was on them?

A. No, I didn't. I just looked at the head line.

X-Q. 33. At the word Beech-Nut?

A. That's all.

X-Q. 34. You didn't pay any attention to the name at all?

A. No.

X-Q. 35. If you wanted a shirt like an Arrow shirt, you would see if Cluett-Peabody's name was on it, would you not?

A. Yes.

X-Q. 36. You have probably had that experience?

A. Yes, that is true.

X-Q. 37. You are in the shoe business?

A. Yes.

X-Q. 38. Have you ever heard of the Hanan shoe—  
H-a-n-a-n?

A. Yes.

X-Q. 39. You know that the Hanan Shoe Co., for example, like many merchandise concerns, will have a very high grade, expensive shoe, and then they will have shoes of other prices, not of the same superior grade?

A. Yes.

X-Q. 40. And that is so in a great many lines of business?

A. Absolutely.

X-Q. 41. So, for example, you, as a smoker, would not expect in all common sense, to get a package of twenty cigarettes at the price of 15 cents that would equal a pack of, say, Pall Malls, ten in a pack, for 25 cents, would you?

A. You wouldn't expect the same quality.

X-Q. 42. That is what I mean. The Pall Malls you would naturally expect, you would naturally expect the high price cigarette to be superior, as you would in the shoe business?

A. Yes.

X-Q. 43. I understood you to say you had purchased Beech-Nut chewing gum.

A. Chewing gum, yes.

X-Q. 44. Did you ever go into a store and ask the man for a package of Beech-Nut chewing gum and have him pass you out a substitute and you accepted a package of these Lorillard Beech-Nut cigarettes for the chewing gum?

A. No, not when I ask for gum.

X-Q. 45. You would be crazy if you took the cigarettes for the gum?

A. Yes.

X-Q. 46. You think that a man would be crazy or insane that would try to pass off cigarettes for gum, wouldn't you?

A. Yes, sure.

X-Q. 47. You never chew tobacco?

A. No.

X-Q. 48. You never heard of this Lorillard scrap tobacco like the package I show you (Mr. Cavanagh shows witness a package of Beech-Nut chewing tobacco)?

A. Only the same as the package, that is all; I didn't take any notice to see who put it out.

X-Q. 49. You didn't pay any attention to that?

A. No.

Cross-examination closed.

Signature of witness waived.

Deposition closed.

#### STIPULATION.

It is stipulated between the parties, through their respective counsel, that if J. P. McHUGH were called, he would testify as follows:

I am of legal age, a lumberman by occupation, and my residence is at 12 East 31st street, New York City. I have seen the Beech-Nut cigarettes advertised, have seen them displayed in cigar store windows, and have seen posters of them in cigar store windows and on billboards since the spring of 1921. I believed until today, when I was advised by Mr. Griffin, a representative of the Beech-Nut Packing Company, to the contrary, that these cigarettes were a product of the Beech-Nut Packing Company, the same people who make chewing gum and other products.

On cross-examination the witness would state that he never paid any attention to the advertising and never examined it to see whose name was on it; that if he had examined this package to see whose product it was, and

seen Lorillard's name on it, he would recognize it as a product of the P. Lorillard Co. That he never personally purchased any of these cigarettes, never having had occasion to, and therefore never examined a package carefully. He has never smoked any of these cigarettes.

ADAM SATTIG (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Adam Sattig; you are the proprietor of a grocery store and also sell meat products in Milford, Connecticut. This store employs four people altogether. You are 58 years of age, and your residence is No. 3 Center street, Milford, Connecticut, while your store is located on River street, Milford, Connecticut; is that correct?

A. Yes.

Q. 2. I show you a package of cigarettes (Mr. Hinton showed the witness a package of Beech-Nut cigarettes), which is in this case as Beech-Nut Exhibit No. 1. Have you ever seen these cigarettes before or advertisements or posters displaying these cigarettes?

A. I did.

Q. 3. When did you first see these cigarettes approximately?

A. I should say that I saw them next door here on the shelf.

Q. 4. This year, was it?

A. Oh, sure, this year, but if in the last month or so I couldn't tell you the exact date, because I go in there every day at least.

Q. 5. Did he have the cigarette boxes on display in the store on the show case?

A. No, on the shelf.

Q. 6. When you first saw these cigarettes, Mr. Sattig, by whom did you believe they were put out?

A. By the Beech-Nut people.

Q. 7. What made you believe that, do you know?

A. Because on account of the name Beech-Nut showed similar to all their packages; the label.

Q. 8. How long did you continue to believe these cigarettes were a product of the Beech-Nut people?

A. Why, I can't tell exactly how long, but quite a while. Mr. Peters called my attention to the name Lorillard and afterwards I spoke to Mr. Peters about handling my starch. I got a Flossy starch, and I told him if they put up cigarettes and advertised them, they have got enough money to put my starch on the market.

Q. 9. Now, Mr. Sattig, you say you told Mr. Peters if they are putting up and advertising cigarettes that they could do it for your starch. What do you mean by "they"?

A. The Beech-Nut people.

Q. 10. You say after your attention had been called to the name Lorillard on these Beech-Nut cigarettes, you said what has just been quoted, to Mr. Peters the next time you saw him?

A. Yes.

Q. 11. Will you tell me just what you thought the situation was, after your attention had been called to the name Lorillard on this package?

A. I thought Lorillard was making and putting them up for the Beech-Nut Company, that is what I thought, because that is what I wanted to do for the starch.

Q. 12. In other words, you wanted Mr. Peters to distribute the starch?

A. Yes, because I didn't have the money to do so myself.

Q. 13. What did Mr. Peters tell you?

A. He told me that the Beech-Nut people had nothing to do with the cigarette. That was the first I was positive they did not. I knew him so long I thought he would know.

Q. 14. I show you a package of scrap tobacco (Mr. Hinton shows the witness a package of Beech-Nut chewing tobacco), which has been marked in this case as Defendant's Cross-Exhibit No. 1. What brand is that on that tobacco?

A. Beech-Nut.

Q. 15. Whose product would you take that to be?

A. Beech-Nut people.

Q. 16. Had you ever seen this tobacco before you were shown this package the other day?

A. No, not that one.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 17. Do you sell Beech-Nut products here?

A. I do.

X-Q. 18. What do you sell?

A. Everything in their line; Beech-Nut catsup you will find up here (indicating), and if you will come up here I will show you. (Witness walked to front of store with Mr. Cavanagh.)

X-Q. 19. Do you sell tobacco products?

A. No, sir.

X-Q. 20. Did you ever sell them?

A. No, sir, that is years ago, but not here in Milford.

X-Q. 21. You never sold Beech-Nut cigarettes?

A. No, sir.

X-Q. 22. Do you smoke?

A. No, sir.

X-Q. 23. So you have never smoked Beech-Nut cigarettes?



A. No, sir.

X-Q. 24. When did you first have a package of Beech-Nut cigarettes in your hand?

A. I never had them in my hand. I looked at them on the shelf in the restaurant, that is the first package that I ever saw.

X-Q. 25. You looked at them at a distance?

A. No, they are right on the counter on the shelf.

X-Q. 26. So you didn't pick up a package and examine them?

A. No, I saw them from a distance.

X-Q. 27. You didn't take the trouble to see whose name was on that package?

A. No.

X-Q. 28. You know that P. Lorillard Company's name is on that package now?

A. Yes, I do now when my attention was called to it.

X-Q. 29. I have purchased from you a small glass of Beech-Nut brand peanut butter. You have also referred to the Beech-Nut scrap tobacco. Whose name appears on the scrap tobacco? (Mr. Cavanagh indicates.)

A. Lorillard, where you have just pointed.

X-Q. 30. So that would indicate to you that it was Lorillard's?

A. No, sir, it would not. It would indicate to me that Lorillard was putting them up for the Beech-Nut people.

X-Q. 31. Do you see their name anywhere on the package?

A. No, sir, Beech-Nut there and Beech-Nut there. (Indicating.)

X-Q. 32. On this small jar of peanut butter which I have purchased from you, you notice the name Beech-Nut Packing Company, do you not?

A. Yes, I see the Beech-Nut name right above there.

X-Q. 33. You see Beech-Nut Packing Company?

A. I do.

X-Q. 34. And the address, Canajoharie, N. Y.?

A. Yes, sir.

X-Q. 35. And on this small package of gum I show you (Mr. Cavanagh shows witness package of Beech-Nut chewing gum), you also see the name Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 36. And Canajoharie, N. Y.?

A. Sure.

X-Q. 37. But do you know of any product of the Beech-Nut Packing Company where their name don't appear on it?

A. That I couldn't say. We don't scrutinize the labels to such an extent, knowing they are Beech-Nut products and put them on our shelves, and sell them, as I sold you this peanut butter.

X-Q. 38. Do you know of any package of this peanut butter that has red radiating lines on it as this package of Beech-Nut scrap tobacco?

A. That I couldn't say, I don't remember any.

X-Q. 39. On this Beech-Nut Packing Company's label they have a wide red band, with the words Beech-Nut Peanut Butter printed on it, do they not?

A. That one, yes.

X-Q. 40. You don't find any red band on that package (Mr. Cavanagh indicating package of Beech-Nut scrap tobacco)?

A. No.

X-Q. 41. And the Beech-Nut label is a nut imposed on three green leaves?

A. That one, yes.

X-Q. 42. You didn't notice any such words on that?

A. No, that one changed my opinion as to the Beech-Nut goods.

X-Q. 43. And on this Lorillard package you find the words "Lorillard" and "Beech-Nut tobacco," do you not?

A. I do.

X-Q. 44. You never heard of the Lorillard Company?

A. Sure.

X-Q. 45. They are large tobacco manufacturers, are they not?

A. I suppose so.

X-Q. 46. You never heard of them in the trade?

A. Sure.

X-Q. 47. If you saw the name Lorillard on there you would know it was their product, wouldn't you? And came from their factory?

A. No, sir, I would not think they were putting it up, but that a large concern was putting it up for other people. I was with Lewis De Groff & Son of New York City and there is their goods and labels and we had this man put up our jellies and the other man put up their goods and from my experience I was satisfied it was a product of the Lorillard Company put up for the Beech-Nut people.

X-Q. 48. Then your theory would be that the Lorillard Company, the tobacco concern, put out a tobacco with their name on it for the Beech-Nut Packing Company and without the name Beech-Nut Packing Company appearing anywhere on that label? Now, as I cannot conceive of that situation, would you kindly get me a can which you have spoken of where any such condition would exist? (Witness got a glass jar.)

X-Q. 49. Now you have handed me a can of sweet corn which I will gladly purchase, and it bears on it the name of Lewis De Groff & Son, wholesale distributors, New York. Now whose goods are these?

A. Mine, I paid for it from Lewis De Groff. You mean who put it up?

X-Q. 50. Yes.

A. Well, you shouldn't ask me that. Who put it up for them I couldn't say but the U. S. Register office will tell you because there is registered the U. S. patent on it.

X-Q. 51. Does the name of the manufacturer or party that put those goods up appear anywhere on that label?

A. No.

X-Q. 52. There is absolutely nothing to indicate where that can came from; the only thing that appears on there is De Groff's name, is it not?

A. De Groff's.

X-Q. 53. Your name doesn't appear on it, does it?

A. Not that I know of, I don't see it there.

X-Q. 54. So that, as far as the public is concerned, looking simply at this label, they wouldn't know the concern that manufactures this; whether it was a high grade corn concern or whether it was from some inferior factory or they wouldn't know it was coming to a first class store like yours or whether it was coming to some store that would sell seconds. All that appears on there is Lewis De Groff & Sons?

A. Yes.

X-Q. 55. So you couldn't tell, as far as that went, where the corn came from?

A. Only that that corn was put up by Lewis De Groff.

X-Q. 56. I am not in any way trying to confuse the situation, Mr. Sattig, I simply want to get a clear explanation. On this package of scrap tobacco we have the name Lorillard, which is, as you know, a tobacco house, and they manufacture tobacco. The Beech-Nut

Packing Company's name does not appear on this so there is nothing to indicate on that package that Lorillard ever put out anything for the Beech-Nut Packing Company. On the contrary, in this case of the can of sweet corn there is nothing to indicate the manufacturer, the same as the Lorillard Co. would be for the tobacco, but there is something to indicate the distributor, Lewis De Groff & Son. Now, my point is that you don't know of any case of this sort where the manufacturer's name would appear on it and not the distributor where it was made for the distributor, do you?

A. No, I couldn't tell you that.

X-Q. 57. That is all on that point.

A. You will agree with me that Lewis De Groff has got the label registered, won't you?

X-Q. 58. I absolutely will not, as a patent lawyer, I will not.

A. (Witness gets a jar of jelly from shelf.) I know the party that puts this up because I have been in that place. I just want to see if they have got it on there.

X-Q. 59. Mr. Sattig, if you went into a store and wanted to purchase some Beech-Nut peanut butter or Beech-Nut jellies or Beech-Nut gum and you asked the clerk for peanut butter or jellies or gum, would you be confused or deceived into taking a package of this Beech-Nut scrap tobacco or Beech-Nut cigarettes for jelly or gum?

A. I don't quite understand that question.

X-Q. 60. I will just explain that. The point is this, that if you went into a store and said to the man, "Give me a package of Beech-Nut jelly" or Beech-Nut gum and that man handed you out a package of Beech-Nut cigarettes, you would not take the package of Beech-Nut cigarettes for the gum or jelly?

A. I would think I had Beech-Nut in my hand if the name Beech-Nut was on there I would be satisfied that the Beech-Nut people were putting it out and would purchase it for that.

X-Q. 61. If you went into a store and wanted a package of Beech-Nut gum and you were handed a package of Beech-Nut cigarettes, would you take the Beech-Nut cigarettes in place of the gum?

A. Certainly not, if I asked for the gum.

X-Q. 62. You would know the difference between the cigarettes and the gum immediately?

A. Certainly.

Cross-examination closed.

*Re-Direct Examination by Mr. Hinton.*

R-D. Q. 63. On one of the questions of the cross-examination I understood Mr. Cavanagh to say that there was nothing on this package of Beech-Nut scrap tobacco to indicate that the Beech-Nut people put it out. Do you agree with that statement?

A. No, sir, I take it that the Beech-Nut name would be Beech-Nut goods.

*Re-Cross-Examination by Mr. Cavanagh.*

R-X Q. 64. You mean the word Beech-Nut?

A. The word Beech-Nut on there would satisfy me it was a Beech-Nut product.

R-X Q. 65. But you don't find the name Beech-Nut Packing Co., do you?

A. I didn't scrutinize the label as closely as that. If I went into a store to buy a package of Beech-Nut gum I would not take any cigarettes, but if I bought a package of Beech-Nut tobacco I would think it was their product, and I am still of the opinion that the Lorillard Company are putting out the cigarettes for the Beech-Nut people.

R-X Q. 66. In spite of the fact that you found Lorillard's name on it?

A. Sure, that wouldn't make any difference any more than this starch here if I had it put up under the Beech-Nut name.

R-X Q. 67. So that the public would be led to believe this was a product of the Beech-Nut Packing Company?

A. Not at all, I would say that it was the Beech-Nut people that were putting out my goods.

R-X Q. 68. How long have you known the Lorillard people to put out Beech-Nut tobacco?

A. As I said before, I don't know how long.

R-X Q. 69. Do you know how many years they have been putting it out?

A. No.

R-X Q. 70. Do you know how long Beech-Nut tobacco has been on the market?

A. No, sir, I don't.

R-X Q. 71. Never heard of it before?

A. I have not seen it before.

R-X Q. 72. You would be surprised if you found they had been putting it out for years?

A. No, sir.

Mr. Hinton: I object to this as immaterial and irrelevant.

The Witness: If you don't—I haven't got time to stand here all day and answer these questions. I have my work to do.

Mr. Cavanagh: Well, if you don't want to answer these questions here, I'll see that you have an opportunity to do so in the United States court.

Mr. Hinton: I would be very glad to have the witness place himself fully at the disposition of the opposing counsel, but this is degenerating into

an argument between the counsel and witness; for instance, on the question of whether the witness knows how long the scrap tobacco has been put out. He has testified that he has never seen it before and that would seem to me to end the proposition.

Mr. Cavanagh: This testimony is being taken in the witness's store. Mr. Cavanagh has endeavored to accommodate Mr. Hinton by coming to examine the witness at the store. As the witness is under cross-examination and as this is a suit pending in the United States District Court for the District of New Jersey, the defendant is entitled to avail himself of his rights under the laws and statutes in such cases made and provided. If Mr. Hinton has any objection to the nature of the questions he shall simply enter his objection on the record and let the court pass on the same.

However, in view of the attitude assumed by the witness, counsel refuses to cross-examine further and the deposition is closed so far as he is concerned. The Beech-Nut peanut butter purchased from the witness is marked for identification as Defendant's Cross-Exhibit No. 7.

The deposition of the witness, so far as his opinion of the Lorillard scrap tobacco and the Beech-Nut cigarette is concerned, is objected to as merely opinion made without any support.

Mr. Hinton: The witness has just expressed a perfect willingness to answer any number of questions. My only point is that I don't think that counsel and the witness should engage in argumentative matter about how long Lorillard has put out the scrap tobacco. The witness is proffered to counsel for further cross-examination if he desires to cross-examine him further and is not in a hos-



tile frame of mind. On the contrary, he is, at the present moment, engaged in an amicable and friendly talk with opposing counsel.

Mr. Cavanagh: Opposing counsel tries to make it a habit of being amicable and friendly with every person in this universe when possible.

Mr. Hinton: So does the witness.

Signature of witness waived.

Deposition closed.

SANFORD HAWKINS (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Sanford Hawkins, your age is 67, you are the proprietor of a grocery and general store at 53 Broad Street, Milford, Connecticut, and your residence is 45 Broad Street, Milford, Connecticut, is that correct?

A. Yes.

Q. 2. Do you handle tobacco products in this store, Mr. Hawkins?

A. I do.

Q. 3. Have you sold Beech-Nut cigarettes, similar to the package I now show you (Mr. Hinton shows witness a package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1, in this store?

A. Yes.

Q. 4. How long have you sold these cigarettes here?

A. Well, I started in last spring, about the spring of 1921.

Q. 5. When you first saw these cigarettes, by whom did you believe they were put out?

A. The Beech-Nut Packing Co.

Q. 6. Do you know what led you to that belief?

A. Well, the name Beech-Nut on the goods. Of course, I hadn't seen the package at that time, but they were a demand for them so we put them in and as I sold them I thought first of course, I thought they were put up by the Beech-Nut Packing Company.

Q. 7. Yes.

A. And afterwards, when I came to open them, I found out they were packed by the Lorillard people.

Q. 8. Where did you get your information that they were packed by the Lorillard people as you opened them?

A. By looking over the package.

Q. 9. You mean the carton in which the cigarettes were packed?

A. Well, I don't recall that, but I know I examined the package and I see there was a similarity of the label that the Beech-Nut Packing Company uses and that led me to believe they were the packers of it, but I soon found out by the name they were packed by other parties.

Q. 10. You have referred to the package—what I want to get at is that the container that holds a number of packages of cigarettes in which the cigarettes come.

A. The small package?

Q. 11. Well, how many individual packages of cigarettes are in that package do you know, about?

A. I think there are ten. I don't recall now whether there was or not. I couldn't say positively but of course when I opened up the package, then I—

Q. 12. Was there a slip in the package?

A. I think there was at that time.

Q. 13. I show you a package of Beech-Nut scrap tobacco (Mr. Hinton shows witness package of Beech-Nut

chewing tobacco), which has been marked for identification in this case as Defendant's Cross-Exhibit No. 1. I call your attention to the brand on it; have you ever seen that brand before?

A. Yes, I have seen the same or one similar to that on the Beech-Nut Packing Company's goods.

Q. 14. Yes. Had you ever seen this package of scrap tobacco before or any like it before I showed you this one?

A. No, that is the first time.

Q. 15. Whose product would you take that to be?

A. From just the appearance of it, the Beech-Nut Packing Company's.

Mr. Hinton: That is all, you may cross-examine.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 16. Mr. Hawkins, do you buy tobacco products direct from the manufacturer?

A. No.

X-Q. 17. You know of the Lorillard Company, don't you?

A. Yes.

X-Q. 18. It is a large and well known tobacco concern?

A. Yes.

X-Q. 19. And this name, P. Lorillard Co., on that package indicated to you, when you examined it, that it was a Lorillard product?

A. Yes.

X-Q. 20. And the Lorillard name also appears on this package of Beech-Nut scrap tobacco?

A. Yes.

X-Q. 21. That would indicate to you that it was a Lorillard product, would it not?

A. Yes.

X-Q. 22. And on this question of the label, I show you a package or jar of peanut butter, which has got on it the Beech-Nut Packing Company, Canajoharie, N. Y. Do you recognize that to be the label of the Beech-Nut Packing Company?

A. Yes.

X-Q. 23. That contains a wide red label with printing on it, does it not?

A. Yes.

X-Q. 24. There is no such label on Lorillard products, is there?

A. No.

X-Q. 25. You know it is very common in the trade, especially in connection with packaged goods, to use an oval or a circle or the like on the package?

A. Well, it is quite commonly done.

X-Q. 26. That is a practice in the printing of the label?

A. Well, the Armour people, they use an oval label on theirs.

X-Q. 27. And this package here has the words on it, chewing tobacco, has it not?

A. Yes.

X-Q. 28. And you don't find that on any Beech-Nut label you know of?

A. Chewing tobacco?

X-Q. 29. Yes.

A. No, not chewing tobacco.

X-Q. 30. You never heard of the Beech-Nut Packing Co. putting out a tobacco product?

A. I never had up to that time, but of course they were putting out so many other things all the while I wasn't surprised they were getting out the cigarettes and I supposed, until my attention was called to that, they were putting up the cigarettes.

X-Q. 31. But the products you have been handling of theirs have been food products?

A. Yes, food products altogether excepting chewing gum. I don't know if that is classed in among the food.

X-Q. 32. And the various products which you have, except chewing gum, which you don't know how to classify, all these products have been along the food product line, haven't they?

A. Yes, altogether, with the exception of the chewing gum, I guess.

X-Q. 33. Now, Mr. Hawkins, if a man came into your store and asked you for a package of Beech-Nut chewing gum or asked you for a jar of peanut butter, you wouldn't hand him a package of this Lorillard's scrap tobacco or a package of the Lorillard cigarettes for peanut butter, would you?

A. Oh, certainly not.

X-Q. 34. And you yourself wouldn't be deceived if you wanted to purchase the peanut butter or chewing gum, you wouldn't let a man in the store palm off tobacco on you, would you?

A. Well, now, of course after I found out—

X-Q. 35. Answer my question.

A. Well, of course, after I knew these goods were put up by the Lorillard people, of course I knew that that label did not stand for their goods, the Beech-Nut.

X-Q. 36. The Beech-Nut Packing Company?

A. No, no, because they are—well, there was a similarity, of course, in the two—between the regular label that they have and that one, and they was so near alike that it would deceive me at first until I found out who packed the goods, you know.

X-Q. 37. Will you say that, looking at those labels, that that label on the scrap tobacco isn't like that label (Mr. Cavanagh indicating)?

A. It was so near to it it deceived me at first.

X-Q. 38. The name Beech-Nut?

A. The name Beech-Nut, and I wondered how they could use that and everything so closely resembling that without the permission from the Beech-Nut people, but I was afterwards told by parties who said that they knew—who said that they had given the Beech-Nut people a large amount of money for the use of that label.

X-Q. 39. The label on the scrap tobacco is not the same as the label on the peanut butter?

A. Well, of course, when you come to examine it closely there is a similarity, of course, and a little difference.

X-Q. 40. But my original question was back there if you wanted to buy some peanut butter or chewing gum, would you take this scrap tobacco or cigarettes for chewing gum or peanut butter?

A. Oh, no, no.

X-Q. 41. Did you ever see any Beech-Nut product with those red radiating lines or the like on that scrap tobacco package?

A. No, no, I don't recall any.

X-Q. 42. You never saw any Lorillard cigarettes with that wide red band and the printing on it, did you?

A. No, I haven't seen any.

X-Q. 43. And you never saw a Beech-Nut Packing Company product with the two crossed beech-nuts like that, did you; like is on the cigarette package (Mr. Cavanagh indicating)?

A. No, I haven't seen any, but they have something very similar.

X-Q. 44. They have a single beech-nut imposed on three green leaves, haven't they?

A. Well, I never noticed—yes, that is the one (witness indicating).

X-Q. 45. Do you smoke cigarettes yourself?

A. No.

X-Q. 46. So you never bought the Lorillard cigarettes to smoke yourself?

A. No.

X-Q. 47. But you have bought their other products and know them to be good sellers?

A. Yes, we have handled their products almost ever since I been in business.

X-Q. 48. And sell a good line of goods?

A. Yes, always.

X-Q. 49. And since you found out that Lorillard put out those cigarettes you have still stocked them?

A. Yes.

X-Q. 50. And have purchased them from time to time and know they are Lorillard's?

A. Yes.

X-Q. 51. And if a customer came in and asked you for some of them you would be interested enough to tell him, wouldn't you—

A. Yes, I think the general public all know that name

(Question continued.) —that they were Lorillard cigarettes?

A. Yes, as far as that goes.

X-Q. 52. I think that is all.

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 53. Have you talked to anybody who came into your store about these Beech-Nut cigarettes?

A. No, I can't say that I have.

R-D. Q. 54. Has anybody who comes into your store and wants to buy these cigarettes, told you he thinks they are made by the Lorillard Company?

A. No, they just simply come in and ask for a package of Beech-Nut cigarettes, and I hand them out.

R-D. Q. 55. And you have not discussed this question of who makes these cigarettes with the people who come into the store?

A. No, I don't recall.

R-D. Q. 56. You don't recall any conversation with anybody about it?

A. Only in regard—I know I had several times reference to—I thought they would have to get a permit from them to use that label. That's all I have recalled speaking about.

R-D. Q. 57. Then your statement that the general public knows about this is just a guess on your part?

A. As far as I know, as far as our customers are concerned. When I say general public, of course, that had not ought to have been so wide, it covers too much.

Redirect examination closed.

Signature of witness waived.

Deposition closed.

ALEXANDER C. GARDNER (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. You are the proprietor of a grocery and confectionery store, which sells tobacco products, in Milford, Connecticut; your age is 37; your residence is 11 Cherry street, and your store is located at 28 Baldwin street, Milford, Connecticut; is that correct?

A. Yes.

Q. 2. How many people do you employ in this store altogether?



A. This one here?

Q. 3. No, both, altogether.

A. Nine.

Q. 4. Do you sell tobacco products in this store?

A. Yes.

Q. 5. I show you a package of cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1. Do you remember when you first stocked these cigarettes in this store?

A. When I did?

Q. 6. Yes.

A. I don't remember exactly.

Q. 7. Do you remember whether it was spring, summer, or fall?

A. Well, let's see; I should say we got those in about the middle of winter, probably a little later.

Q. 8. In the early spring?

A. Yes, in the early spring.

Q. 9. This year?

A. Yes.

Q. 10. When you first saw these cigarettes, by whom did you believe they were made?

A. The Beech-Nut Packing Co.

Q. 11. Why did you believe that?

A. From the label, the Beech-Nut label.

Q. 12. Do you refer to this oval device on the front of the package of cigarettes?

A. Yes.

Q. 13. Do you now believe they are made by the Beech-Nut Packing Company?

A. No.

Q. 14. When did you first find out they were not made by the Beech-Nut Packing Company, do you remember?

A. There was a salesman, who informed me they were not a Beech-Nut product.

Q. 15. Have you ever had any customers make any remarks to you over the counter about these cigarettes; if so, will you state the nature of the remarks?

A. Why, they said if they were as good as the other Beech-Nut products they would be all right.

Q. 16. Can you remember any other remarks that was made over the counter?

A. Well, let's see, my mind is so full of other things—I was just trying to get these orders out.

Q. 17. All right. Never mind that. Have you, since you knew who made these cigarettes, ever told customers they were a product of the Beech-Nut Packing Company?

A. No, but I have had to inform them they were not a product of the Beech-Nut Packing Company.

Q. 18. How often has this happened; I don't mean the exact number, but has it been frequent or not?

A. Quite frequent when they first came out.

Q. 19. Yes. Have you ever seen a package of this scrap tobacco, which is in this case, marked for identification as Defendant's Cross-Exhibit No. 1 (Mr. Hinton shows witness package of Beech-Nut chewing tobacco), before I showed you one the other day?

A. Not until you showed it to me.

Q. 19. I call your attention to the oval panel on the front of this package of scrap tobacco. Have you ever seen that device before?

A. On all Beech-Nut products.

Q. 20. Whose product would you take this to be?

A. Beech-Nut Packing Company from the label.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 21. I understand you first bought the Beech-Nut cigarettes several months ago, did you?

A. Yes.

X-Q. 22. Are you still buying them?

A. Yes.

X-Q. 23. From whom do you buy them?

A. New Haven Tobacco Co.

X-Q. 24. You don't buy from the manufacturer?

A. No.

X-Q. 25. You have bought at least several orders of these cigarettes, I presume, since you first knew they were Lorillard's?

A. Yes, I buy them in one thousand lots.

X-Q. 26. And it is a good seller?

A. Yes.

X-Q. 27. You know of the Lorillard Co.?

A. Yes.

X-Q. 28. You know they are large tobacco manufacturers?

A. Yes.

X-Q. 29. And you have handled their goods of various kinds?

A. Yes.

X-Q. 30. Have they always been very satisfactory?

A. Yes.

X-Q. 31. Lorillard has a good reputation as a tobacco concern?

A. As far as I know; of course I never dealt direct with them, but—

X-Q. 32. You have always handled their goods?

A. Yes.

X-Q. 33. And have handled a lot of their brands?

A. Yes.

X-Q. 34. The name Lorillard always appears on the package, does it not?

A. Yes.

X-Q. 35. And that would indicate it was a Lorillard product?

A. Well, the name is so small at first you wouldn't notice it.

X-Q. 36. But if you took the trouble to examine it, you would notice it, would you not?

A. Yes, I would notice it; of course I can read.

X-Q. 37. You never heard of the Beech-Nut Packing Company putting out a tobacco product, did you?

A. No.

X-Q. 38. You never sold any Beech-Nut Packing Co. tobacco products, did you?

A. No.

X-Q. 39. Do you sell Beech-Nut products?

A. Yes, sir.

X-Q. 40. Of the Beech-Nut Packing Co.?

A. Yes, sir.

X-Q. 41. What do you sell?

A. Jellies, jams, chewing gum, beans, catsup, jelly sauce.

X-Q. 42. That's enough. If a person came into your store and asked you for any of those products of the Beech-Nut Packing Company that you have just named, you wouldn't hand him a package of those Beech-Nut cigarettes in the place of the stuff he asked for, would you?

A. No.

X-Q. 43. And you yourself, if you went into a store and wanted some Beech-Nut chewing gum or asked a man for Beech-Nut jelly, you wouldn't walk out of that store with a package of Beech-Nut cigarettes?

A. Not if I wanted jelly.

X-Q. 44. You wouldn't confuse the two?

A. If a man asked for jelly of any kind, I wouldn't hand him cigarettes of any brand.

X-Q. 45. I show you a can of peanut butter, bearing the Beech-Nut label (Mr. Cavanagh shows witness jar of

peanut butter made by the Beech-Nut Packing Co.), which is in this case, marked for identification Defendant's Cross-Exhibit No. 7. You recognize that label, do you not?

A. Yes.

X-Q. 46. Whose label is that?

A. The Beech-Nut Packing Company's.

X-Q. 47. The name Beech-Nut Packing Company appears on it, doesn't it?

A. Yes.

X-Q. 48. And consists of a wide red band, with printing on it?

A. Yes.

X-Q. 49. With the name?

A. Yes.

X-Q. 50. And has in the center a single beech-nut with leaves superimposed on it?

A. Yes.

X-Q. 51. You don't find on that scrap tobacco a wide red oval band, with a single beech-nut, do you?

A. No.

X-Q. 52. And you know that, from your experience in the grocery and other business, you are in the store business, that lots of products have ovals on the packages and have an oval on which the name appears, do you not?

A. Why, there is some, yes.

X-Q. 53. For instance, Armour's Veribest, and others, have an oval, don't they?

A. Yes.

X-Q. 54. You don't recall any Beech-Nut product having any of those red radiating lines like shown on that package, do you? (Mr. Cavanagh indicating package of Beech-Nut chewing tobacco.)

A. No.

X-Q. 55. That cigarette package hasn't that wide red band, with the name shown on it, has it?

A. No, but I didn't remember the Beech-Nut having a red band until you called my attention to it.

X-Q. 56. You know the oval is very old in the business?

A. Yes, but an oval with a beech-nut is very different from an oval without a beech-nut.

X-Q. 57. But I understood you to say you never knew of the Beech-Nut people to put out any tobacco.

A. No.

X-Q. 58. You have never sold any of their tobacco?

A. No, but they have put out so many new articles lately that it was no surprise to me to see a Beech-Nut cigarette. I classed it as a Beech-Nut product.

X-Q. 59. All the Beech-Nut products you have known have been in the nature of food products, have they not?

A. Yes.

X-Q. 60. Did you ever buy any of this Beech-Nut scrap tobacco yourself?

A. Yes.

X-Q. 61. You don't handle the Beech-Nut scrap chewing tobacco?

A. No.

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 62. You say you handle Beech-Nut chewing gum?

A. I do.

R-D. Q. 63. You said that chewing gum is a food product?

A. I don't know that it is exactly a food.

R-D. Q. 64. Where do you keep your chewing gum here?

A. Right on top of the case. You got the Beech-Nut gum out of it.

R-D. Q. 65. Yes. Is that case adjoining——

A. Right next to the cigar case.

Mr. Cavanagh: But you keep the chewing gum on top of your candy case, do you not?

The Witness: Yes.

Mr. Cavanagh: And it is not on top of the cigar case?

The Witness: No.

Mr. Cavanagh: It is more of a confection than it is tobacco?

The Witness: Absolutely.

Redirect Examination continued by Mr. Hinton.

R-D. Q. 66. Did you ever go into a United Cigar store?

A. I have been in them.

R-D. Q. 67. Do you know where they keep the chewing gum in the United Cigar stores?

A. I have seen it right on top of the cigar counter.

R-D. Q. 68. Do you know if that is the universal practice in the United Cigar Stores?

A. I don't know if it is universal.

Redirect examination closed.

Signature of witness waived.

Deposition closed.

#### STIPULATION.

It is stipulated by and between the parties, through their respective counsel, that if C. A. SATTIG were called, he would testify as follows:

My name is C. A. Sattig; I am of legal age; I work in the grocery and meat store of Adam Sattig, who testified in this case, and am his son. I first saw the Beech-Nut cigarettes advertised and on display in the early spring of 1921. I believed that they were a product of the Beech-

Nut Packing Co. I bought a number of packages, I do not know exactly how many, in that belief, and smoked them. I continued to believe that these cigarettes were a product of the Beech-Nut Packing Co. until about three months after I had bought my first package. I was riding in a train and I pulled out a package of Beech-Nut cigarettes to smoke one, and a man in the seat next to me said, "Why do you smoke those Beech-Nut cigarettes?" and I said, "Well, the Beech-Nut people make good stuff," and he said, "Those cigarettes are not made by the Beech-Nut people," and called my attention to the name P. Lorillard Co. on the package.

It is further stipulated that on cross-examination the witness would say, that he made no particular examination of the package and did not notice the name P. Lorillard Co. thereon; that if he had he would have known the cigarette to be a product of that company; if he went into a store to buy chewing gum or any Beech-Nut food product he would not be confused or deceived into accepting a package of the Lorillard Beech-Nut cigarettes in the place of the chewing gum.

NEWTON HARRISON (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Newton Harrison; you are the proprietor of a dry goods store in Milford, Connecticut; your residence is 8 Crown street, Milford, Connecticut, and your store is located at 18-20 Broad street, Milford, Connecticut; you are of legal age; is that correct?

A. Yes.

Q. 2. Mr. Harrison, what else do you do beside being the proprietor of a drygoods store?



A. Editor of the Central Station, a monthly newspaper devoted and representing the interests of the electric light and power plants of the United States.

Q. 3. I show you a package of cigarettes (Mr. Hinton shows witness a package of Beech Nut cigarettes), which is in this case, marked as Plaintiff's Exhibit No. 1, and ask you if you have ever seen these cigarettes before, and if so, when you first saw them?

A. Sometime in the spring in Mr. A. C. Gardner's store.

Q. 4. Do you remember the month?

A. Yes, April, and I purchased a package.

Q. 5. Why did you buy these cigarettes when you first saw them?

A. Because I saw the character of the name and believed it to be a Beech-Nut product. I thought it was good, and I thought I would try them.

Q. 6. You thought it was good before you bought the cigarettes?

A. I thought it was a Beech-Nut product, I thought the package was a good package, so I tried it, believing it was a Beech-Nut product.

Q. 7. You subsequently bought other packages?

A. Yes, other packages.

Q. 8. When did you first buy these cigarettes; was that in the spring?

A. Sometime in the spring, I presume; I couldn't give you the exact date, but believe it was in Gardner's store, but I have seen them in other places since then, believing it was a Beech-Nut product.

Q. 9. Do you now believe it is a Beech-Nut product?

A. Not since I have heard from your representatives quite recently that the Beech-Nut people have nothing to do with it.

Q. 10. Do you remember seeing myself and another

man get out of an automobile in front of Mr. Gardner's store?

A. Last week?

Q. 11. Last week.

A. Yes, and I said first, "Why don't you bring out a good grade of near beer as long as you have so many other good products. Then you spoke to me and I discovered in a very short time that the Beech-Nut cigarette was not made by you, at which I was very much surprised.

Q. 12. What was on this automobile we got out of?

A. Beech-Nut stamp, the Beech-Nut trade-mark.

Q. 13. And was it that—

A. That was what attracted my attention.

Q. 14. And then you said to me, "Why don't you put out a near beer?"

A. I was thinking of the other companies that had made near beer, and I thought in these prohibition days you might develop a nice branch of your business by use of the Beech-Nut trade-mark.

Q. 15. Do you remember what I asked you exactly?

A. You told me at the time, as nearly as I can recollect, that had I any particular brand in mind. I said, "You recently came out with a Beech-Nut cigarette." I think that was what I said as nearly as I can remember.

Q. 16. Yes, that is my recollection. You have bought Beech-Nut products before, have you?

A. Yes, jellies.

Q. 17. And what has been your experience with them?

A. They were excellent, always excellent, good quality, what we call a good brand. The name Beech-Nut seems to speak well for their ginger ale and jellies and such products as I have bought.

Q. 18. I show you a package of scrap tobacco (Mr. Hinton shows witness package of Beech-Nut chewing to-

bacco), which is in this case as Defendant's Cross-Exhibit No. 1. Have you ever seen that brand or panel on that before; I mean have you ever seen that label before?

A. Yes.

Q. 19. Where have you seen it?

A. I have seen it in Bridgeport in a tobacco store.

Q. 20. Have you ever seen this label on any other product?

A. Why, that particular label—

Q. 21. Or one like it?

A. I have looked at that label and believed it to be a label belonging to the Beech-Nut Company because the name Beech-Nut seems to be comprehensive. I naturally concluded it was a Beech-Nut product, that was my impression of it, also the cigarette.

Direct Examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 22. How often did you purchase these Beech-Nut cigarettes?

A. Well, we will say a half a dozen times. I smoke various brands. I buy Murads, Pall Malls, Chesterfields or Egyptians, and I have been buying Saulsbury's lately. I tried the Beech-Nut. I have had Beech-Nut cigarettes in the house; we gave them to friends and they smoked whatever we had there.

X-Q. 23. Have you ever heard of P. Lorillard Co.?

A. Yes.

X-Q. 24. You know them to be large tobacco manufacturers?

A. Yes.

X-Q. 25. Do you notice the name P. Lorillard Co. now?

A. Yes, I notice it now but would not have otherwise.

X-Q. 26. Do you notice the name Beech-Nut on there?

A. Yes.

X-Q. 27. If you had taken the trouble to notice the name Lorillard—

A. I would have noticed it was not a Beech-Nut product, but the Beech-Nut trade-mark is so conspicuous that I didn't draw any other conclusion but that it was a Beech-Nut product.

X-Q. 28. That is, that word Beech-Nut?

A. That is sufficient.

X-Q. 29. And if you had taken the trouble to examine the package and noted the P. Lorillard Co. on it you would have known it was the tobacco company's product and not the Beech-Nut Company's?

A. Yes, but the Beech-Nut is very conspicuous and the Lorillard very inconspicuous.

X-Q. 30. On this scrap tobacco (Mr. Cavanagh shows witness package of Beech-Nut chewing tobacco), can you find the name Lorillard on that?

A. Yes, if you know where to look for it.

X-Q. 31. You have never seen any Beech-Nut products with any of those red radiating lines on it like that, have you?

A. To my recollection they have a simple oval trade-mark, that is as far as I saw the goods, that is the way I remember their product. It just has a red oval with Beech-Nut in it.

X-Q. 32. Do you know that in trade-marks it is very customary to use an oval on packages?

A. Yes, it seems to be convenient for them.

X-Q. 33. Did you ever hear of the Beech-Nut Packing Company putting out any tobacco product whatsoever?

A. Not since I have been informed, I realized they haven't put out any tobacco products. It was a surprise to me to know it wasn't their product.

X-Q. 34. You never made any particular inquiries to find out whether or not it was their product?

A. I took it as a matter of course that it was their product.

X-Q. 35. Because of the name Beech-Nut?

A. Yes, because of the name Beech-Nut.

X-Q. 36. You don't know how long the Lorillard people have been using that as a trade-mark, do you?

A. No.

X-Q. 37. If you went into a store and wanted a package of Beech-Nut jelly or gum, would you be confused or deceived into accepting a package of Beech-Nut cigarettes in place of the gum or jelly?

A. I don't think so.

X-Q. 38. You would think a man who did was crazy, wouldn't you?

A. Yes.

That's all.

Cross-examination closed.

Signature of witness waived.

Deposition closed.

JOHN F. GRIFFIN (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is John F. Griffin; you are 26 years of age; you reside at 518 Orange Street, New Haven, Connecticut and your occupation is salesman; is that correct?

A. Yes.

Q. 2. By whom are you employed, Mr. Griffin, and how long have you been employed by this concern?

A. I am employed by the Beech-Nut Packing Company and have been for two and three-quarter years; two years and eight months.

Q. 3. What territory do you cover?

A. All Connecticut but Fairfield County.

Q. 4. What do you sell?

A. I sell confectionery, chewing gum and beverages.

Q. 5. I show you a package of cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes) which is in the case as Plaintiff's Exhibit No. 1; do you remember when these cigarettes came out in your territory?

A. March, 1921.

Q. 6. Have these cigarettes appeared in the state generally?

A. Yes.

Q. 7. Have they been displayed in windows of stores and the like?

A. Yes.

Q. 8. Have you seen advertising and posters of these cigarettes?

A. Yes.

Q. 9. Have you, in the course of your traveling about from place to place for the Beech-Nut Packing Company, heard anybody make any comments, remarks or inquiries about these cigarettes?

A. Yes.

Q. 10. Will you state the nature of these comments, inquiries or remarks? What did they say?

A. They asked me how they were going, how they were selling, and they are selling because Beech-Nut products always have been known to be good products and people asked me for samples.

Q. 11. I wish you would give me a strictly conservative estimate as to the number of comments you have

heard; or this kind of remarks made since this spring.

A. About five or six hundred and I am hearing them every day yet.

Q. 12. What is this? (Mr. Hinton shows witness photograph.)

A. That is a photograph of a window display I had taken.

Q. 13. Where was that window display?

A. At the corner of Elm Street and First Avenue, West Haven.

Q. 14. What store?

A. It was in the drug store.

Q. 15. Who was the proprietor?

A. Mr. Coughlan, I don't know his initials.

Q. 16. Was he one of your customers?

A. Yes.

Q. 17. Did you have this photograph taken yourself?

A. I saw the window display and went there and got this Mr. Madden and he took the photograph.

Q. 18. Do you recognize it as the picture of this display?

A. Yes.

Q. 19. Now, Mr. Griffin, did you in any way instigate or cause this display to be made?

A. None whatsoever.

Q. 20. I refer to the display of the Beech-Nut gum in this picture.

A. None whatsoever.

Q. 21. Have you investigated through the company's sources and do you know whether the Beech-Nut Packing Company recently sent the proprietor of this store this display of gum boxes or whether they are old boxes?

A. They are old boxes. We are not sending out gum advertising now on account of the scarcity.

Q. 22. When was this picture taken?

A. The 24th day of August, I think.

Q. 23. Were you present when it was taken?

A. Yes, sir.

Mr. Hinton: The photograph, identified by the witness, is introduced and offered in evidence as Plaintiff's Exhibit No. 2, West Haven Drug Store Display.

Mr. Cavanagh: The exhibit is objected to as immaterial and irrelevant and is not properly proven.

#### STIPULATION.

It is stipulated by and between the parties, through their respective counsel, that if FRANK MADDEN was called, he would testify as follows:

I am of legal age and reside in New Haven, Connecticut. I am a photographer by trade and am frequently employed by Donnelly's Photo Studio, 1050 Chapel Street, New Haven, Connecticut, to take photographs.

I was employed on August 25th, 1921, to go with Mr. Griffin of the Beech-Nut Packing Company and take a photograph of a display in a drug store on the corner of Elm Street and First Avenue, West Haven, Connecticut. I accordingly took the photograph, developed it, and printed it. The photograph, which is marked in this case as Plaintiff's Exhibit No. 2 (West Haven Drug Store Display Window) is the photograph which I then and there took.

Mr. Cavanagh: Without waiving any objections to the introduction of this photograph as an exhibit, so far as it concerns its immateriality and



irrelevancy, counsel for P. Lorillard Co. proceeded to cross-examine Mr. Griffin as follows:

X-Q. 24. Did you personally instruct the photographer Madden to take this picture?

A. Indirectly I did.

X-Q. 25. Just tell us how it happened.

A. Well, Mr. Hinton and I were coming up from West Haven; we saw the window there and thought we would have it taken, so I got this employee, this Frank Madden, to come with me and photograph this window display.

X-Q. 26. What instructions did you give Madden?

A. To take the photograph of this window and—just to make a photograph of the window. That's about all the instructions I gave him.

X-Q. 27. Did you say anything to the proprietor of the drug store about it?

A. I asked him where he got the display from, as there was hardly anybody displaying Beech-Nut gum because you can't get it under the circumstances and it seems that it was some old advertising he had in his cellar.

X-Q. 28. Will you look at the part of this photograph so far as the section under the window, under Ex-LAX is concerned; is that a true representation, do you know, of the advertisements that appear in that window?

A. Why, yes, it is.

X-Q. 29. You never sold tobacco for the Beech-Nut Packing Company, tobacco products?

A. No.

X-Q. 30. So far as you know, they don't sell tobacco products, do they?

A. No, sir.

X-Q. 31. You never told any persons that these Lor-

illard Beech-Nut cigarettes were a product of the Beech-Nut Packing Company, did you?

A. No, sir.

X-Q. 32. You didn't keep any particular account of the number of people that asked you if they were as good as the chewing gum and the other remarks you made, did you?

A. Just approximately.

X-Q. 33. I mean, you didn't keep any count of them?

A. No, no.

Mr. Cavanagh: I think that will be all.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 34. Can you give me any particular instances of people who made these comments and remarks you refer to? Please give me no instances except where you can state definitely who made the remarks and definitely what he said.

A. Mr. Marrinan, the drug clerk, one night in a restaurant, came up to me and asked me how the Beech-Nut cigarettes were going.

R-D. Q. 35. Has Mr. Marrinan testified in this case?

A. Yes, he has.

R-D. Q. 36. All right. Give me another one.

A. Mr. Branigan, a shoe clerk on Chapel Street, New Haven, on giving him a few samples of Beech-Nut gum said, "Let me have a few samples of Beech-Nut cigarettes instead."

R-D. Q. 37. Did he testify in this case?

A. Yes, he did, too.

R-D. Q. 38. Can you give me any more?

A. A fellow named James Cashman. On meeting him one day downtown, he asked me how the cigarettes were moving.

R-D. Q. 39. Did he testify in this case?

A. Yes, he did.

R-D. Q. 40. Can you give me another one?

A. Yes, Robert Greene, who runs a store in West Haven, grocery and meat market, just here the other day I got into conversation with him about Beech-Nut cigarettes and when I informed him we weren't making them he said it was an awful surprise.

R-D. Q. 41. What did he say?

A. He said that—he asked me about the sale of cigarettes. "I hear they go good," and I told him we had nothing to do with the cigarettes absolutely.

R-D. Q. 42. He has testified in this case?

A. Yes.

R-D. Q. 43. Now, about this photograph, I notice that on the right of the photograph, it apparently does not run to the extreme end of the window. Do you know, as a matter of fact, whether that photograph shows the entire display of the window or not?

A. No.

R-D. Q. 44. Is there a wide or narrow window on the right?

A. A narrow window, there is a board coming down right here (witness indicates). See that board there, it shows only about a quarter of the big one. I thought he had the whole picture.

R-D. Q. 45. Did he come close to the edge?

A. Awfully close to the edge.

R-D. Q. 46. I mean is there a lot more of this window that doesn't show in the photograph?

A. Oh, no, that is practically the end.

Redirect examination closed.

Signature of witness waived.

Deposition closed.

JOSEPH DE RAGO (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Joseph De Rago; your age, 34; your residence, 82 Spring Street, Hartford, Connecticut; you are the proprietor of a general store at 72 Union Place, Hartford, Connecticut; is that correct?

A. Yes.

Q. 2. Do you handle tobacco in this store, Mr. De Rago?

A. Yes.

Q. 3. I show you a package of cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes) which is in this case as Beech-Nut Exhibit No. 1, being a package of Beech-Nut cigarettes. Have you sold these cigarettes in this store?

A. Yes.

Q. 4. How long about?

A. Since they come out, when they come was in the spring.

Q. 5. Yes. Mr. De Rago, who did you believe made these cigarettes?

A. Always believe Beech-Nut make it; also call same name, that's Beech-Nut.

Q. 7. Yes. Is that the people who make the gum?

A. Yes, that's it.

Q. 8. Do you sell the Beech-Nut gum?

A. Yes.

Q. 9. Mr. De Rago, have you sold Beech-Nut scrap tobacco in this store?

A. Yes, I have been selling for six years here.

Q. 10. Who did you believe made the Beech-Nut scrap tobacco?

A. I believe just the same, Beech-Nut make Beech-Nut scrap tobacco.

Q. 11. Is this the scrap tobacco I show you? (Mr. Hinton shows witness package of Beech-Nut chewing tobacco.)

A. Yes.

Mr. Hinton: The package shown the witness is produced and offered in this case as Beech-Nut Exhibit No. 3, Beech-Nut Scrap Tobacco.

Q. 12. Mr. DeRago, did you ever tell people in this store that this scrap tobacco was made by the Beech-Nut people?

A. They ask me who makes; I say I think Beech-Nut people make the same thing; they say that is right, Beech-Nut makes everything, that's all.

Q. 13. Now, when, if at all, when did you first find out; when was the first time you found out?

A. Today.

Q. 14. That the Beech-Nut people did not make this product?

A. Today.

Mr. Hinton: You may cross-examine.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 15. You say you have been buying this scrap tobacco for about six years?

A. Yes.

X-Q. 16. From whom have you been buying it?

A. I bought it from the wholesale house.

X-Q. 17. What is the name of it?

A. Gregier Tobacco Co., they are all over Connecticut, every place.

X-Q. 18. From whom did you buy your Beech-Nut products, like your chewing gum?

A. I buy from Silver Braun, Corn Brothers, Abel, any of them.

X-Q. 19. How many people do you employ in this store?

A. Nobody.

X-Q. 20. Just yourself?

A. Myself and mother.

X-Q. 21. So you didn't buy anything from the Beech-Nut Packing Company itself?

A. No, but still I send through Silver Braun for some of those marshmallows.

X-Q. 22. But you don't buy direct from the Beech-Nut agent?

A. No, only sometime when they come around, I give them an order and send them to the jobber.

X-Q. 23. Give who the order?

A. The Beech-Nut people, and they send them direct to the jobber.

X-Q. 24. During the last six years about how often have you sold this scrap tobacco? (Mr. Cavanagh indicates a package of Beech-Nut chewing tobacco.)

A. I can't tell you that, about every week, when I run short, I buy every week.

X-Q. 25. You have never asked the Beech-Nut man if his concern put out this tobacco?

A. No, only today he told me he didn't.

X-Q. 26. So that you didn't really have any foundation for saying it was made by the Beech-Nut Company?

A. No.

X-Q. 27. Just a guess on your part?

A. No, that's all.

X-Q. 28. You notice the name Lorillard on this package, do you not?

A. Yes.

X-Q. 29. You notice the name P. Lorillard Co. on this cigarette package, do you not?

A. Yes, but this I cannot read, I don't know how to read in English.

X-Q. 30. How long have you been in this country about?

A. About ten years.

X-Q. 31. From Italy?

A. Yes. I never go to school, I couldn't read.

X-Q. 32. You never went to school and studied English?

A. No.

X-Q. 33. You never saw on your Beech-Nut jellies or gum or food products any of those red lines, did you, like on this Beech-Nut scrap tobacco package?

A. No.

X-Q. 34. If a man came into your store and wanted to buy some Beech-Nut jelly or something such as Beech-Nut chewing gum, you wouldn't sell him this Beech-Nut tobacco for chewing gum, would you?

A. No, we can't do it. If he would have taken them I would sell them.

X-Q. 35. If he wanted gum, you wouldn't deliberately deceive him, would you?

A. No.

X-Q. 36. You were just joking when you said that?

A. Yes.

X-Q. 37. You yourself wouldn't go into a store and buy gum for tobacco, would you?

A. No, I wouldn't do that.

Mr. Cavanagh: That is all.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 38. Mr. DeRago, can you tell me why it was you supposed that these things were made by the Beech-Nut people?

A. I thought it was, it looked the same thing (witness

points to (val brand on two packages), but I never looked at the name, as I told you, because I can't read and never bother with them. People say Beech-Nut makes, and I say I think so. I don't know. Beech-Nut always make them, because the same name.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 39. You spoke about the two beech-nuts on this package. I show you a package of Beech-Nut peanut butter of the Beech-Nut Packing Company; that has got three green leaves, hasn't it?

A. Yes.

R-X Q. 40. And this has two red nuts with no green leaves?

A. Yes.

R-X Q. 41. So that they are not the same, are they?

A. No.

R-X Q. 42. You never took the trouble to look, did you?

A. No, I never took a real look.

Mr. Hinton: I show you a package of Beech-Nut cough drops, which is marked for identification as Plaintiff's Exhibit 4. Is that nut there on three green leaves, or what is the color?

A. You can't tell, you have got no leaves at all here.

Mr. Cavanagh: Do you offer this in evidence?

Mr. Hinton: I will mark it for identification. Do you want me to offer it in evidence? I may want it to go in evidence.

Mr. Cavanagh: Well, mark it for identification.

Signature of witness waived.

Deposition closed.



## STIPULATION.

It is stipulated by and between the parties hereto, through their respective counsel, that if SOLOMON S. KRAMER was called, he would testify as follows:

I am of legal age, and keep a delicatessen grocery and tobacco store at 84 Church street, Hartford, Connecticut. I have been the proprietor of this store for five months. I have stocked and sold in this store a line of Beech-Nut products, such as jellies, jams, chewing gum and the like. I have also stocked and sold Beech-Nut chewing tobacco, similar to Plaintiff's Exhibit No. 3, and Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1.

I believed, until this morning, that the scrap tobacco and the cigarettes were a product of the Beech-Nut Packing Company, the same people that make the rest of the Beech-Nut products that I carry. Customers frequently come in and ask me for Beech-Nut, and I ask them whether they want the Beech-Nut chewing gum, Beech-Nut chewing tobacco or Beech-Nut cigarettes. One customer came in here and asked me for some cigarettes, and I said, "Why not try Beech-Nut cigarettes, they ought to be good, because I carry the rest of the line."

It is further stipulated that on cross-examination the witness would testify as follows:

I never made a close examination, either of the cigarette or the scrap tobacco package, and I never read the name Lorillard thereon. If a customer came into my store and asked for chewing gum I would not give him cigarettes or scrap tobacco, and I would not myself be fooled into buying cigarettes or scrap tobacco if I wanted chewing gum or any Beech-Nut food product.

## STIPULATION.

It is stipulated by and between the parties, through their respective counsel, that if JAMES EUSTACE was called, he would testify as follows:

My name is James Eustace; I am employed at the Sigourney Grocery Company, 97 Asylum street, Hartford, Conn. We sell tobacco products and have carried in stock the Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1, since they first came out, in the spring this year.

I have sold these cigarettes over the counter myself; for the past month we have been out of these cigarettes. I always believed that these cigarettes were a product of the Beech-Nut Packing Company, the same people who make the chewing gum and other Beech-Nut products, and continued to believe that until August 30, 1921, when I was told by Mr. Ray, a Beech-Nut Packing Company salesman, that the Beech-Nut Packing Company had nothing to do with the cigarettes. The reason for my belief was the brand appearing on the cigarettes.

It is further stipulated that on cross-examination he would testify as follows:

I never made an examination of the package and had not seen the name P. Lorillard Co. on the package. If a customer came into my store and asked for Beech-Nut chewing gum I would not hand him a package of Beech-Nut cigarettes, and I would not be confused or deceived myself into taking cigarettes for chewing gum or Beech-Nut jelly or the like.

## STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if EDWARD GROSS was called, he would testify as follows:

I am a clerk employed by the County Market Co., 270 Trumbull street, Hartford, Connecticut, and am of legal age. I have seen Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1, advertised and displayed since the spring of 1921. I believed until the other day that they were a product of the Beech-Nut Packing Company, the same people who make the chewing gum and other Beech-Nut products. I was told the other day by Mr. Ray, a salesman for the Beech-Nut Packing Company, that these cigarettes were not a product of that company. The reason for my belief was the brand on the cigarettes.

On cross-examination the witness would testify as follows:

I never bought a package of Beech-Nut cigarettes and I never made an examination of the package. I never smoked them. I would not confuse Lorillard Beech-Nut cigarettes with Beech-Nut chewing gum, nor would I confuse it with Beech-Nut food products, and I would not accept one of these in place of the other.

## STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if R. A. BROWN was called, he would testify as follows:

My name is R. A. Brown; I am of legal age, and a claim adjuster for the Ocean Insurance Company, located in the Connecticut Mutual Building, Hartford, Connecticut. I have seen the Beech-Nut cigarettes, similar to Plain-

tiff's Exhibit No. 1. When these cigarettes first came out I bought a package because I thought I would get a good smoke, seeing what I thought was the Beech-Nut label on them. I was under the belief that these cigarettes were a Beech-Nut product for about two months until I was told by Mr. Griffin, of New Haven, Connecticut, the Beech-Nut Packing Company's representative, that the Beech-Nut Packing Company had nothing to do with these cigarettes.

On cross-examination the witness would testify as follows:

I have only purchased, as I recall, one package of these cigarettes, and when I purchased them I did not ask for cigarettes of the Beech-Nut Packing Company, but merely for a package of Beech-Nut cigarettes. I did not notice the name P. Lorillard Co. on the package, as I did not examine the package very closely.

I would not be confused or deceived into accepting a package of Beech-Nut cigarettes if I asked the store-keeper for Beech-Nut gum or a Beech-Nut food product, of which there are a number of different brands.

#### STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if HERMAN A. DOLGE was called, he would testify as follows:

My name is Herman A. Dolge; I am of legal age; I am the proprietor of a grocery and delicatessen store on Church street, Hartford, Conn. I have seen the Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1, displayed and advertised in Hartford since the spring of 1921. I believed that these cigarettes were a product of the Beech-Nut Packing Company, and my reason for this belief was the label or brand on the cigarettes. I knew

the Beech-Nut people put out so many articles, including chewing gum, that I was not surprised at their putting out cigarettes. I remained under the belief that these cigarettes were put out by the Beech-Nut Packing Company until August 28th, 1921, when I was told by the Beech-Nut Packing Company's representative that the Beech-Nut Packing Company had nothing to do with these cigarettes.

On cross-examination he would testify as follows:

I do not smoke cigarettes and do not sell tobacco. I have never purchased a package of Beech-Nut cigarettes, and therefore did not make a particular examination of the advertisement on the cigarette package; consequently did not notice the name P. Lorillard Co. thereon, nor did I make any direct comparison of the label on the Beech-Nut cigarettes with one of the Beech-Nut Packing Company's labels.

I would not be confused or deceived into accepting a package of these cigarettes for a package of Beech-Nut chewing gum or other Beech-Nut food product with which I am familiar.

#### STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if JOHN F. WHALEN was called, he would testify as follows:

My name is John F. Whalen; I am of legal age, and am a clerk in the store of C. P. Case, grocer and butcher, 597 Albany avenue, Hartford, Connecticut. I have seen Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1, advertised and displayed in Hartford, Connecticut, since the spring of 1921. I always believed these cigarettes were a product of the Beech-Nut Packing Company, on account of the label that appears on them, until I was ad-

vised by Mr. Ray, a representative of the Beech-Nut Packing Company, on August 28th, 1921, that the Beech-Nut Packing Company had nothing to do with them. I do not smoke, nor have I ever bought a package of cigarettes.

On cross-examination the witness would testify as follows:

I have never purchased or handled the Beech-Nut cigarettes like the Plaintiff's Exhibit No. 1, and never made any particular examination of the advertising or display matter, and therefore did not notice the name P. Lorillard Co. appearing thereon, and that I never made any comparison of the cigarette labels with the Beech-Nut Packing Company labels.

Furthermore, I would not be confused or deceived into accepting the package of these Beech-Nut cigarettes for Beech-Nut chewing gum or a Beech-Nut food product.

#### STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if C. HOUSLING were called, he would testify as follows:

My name is C. Housling; I am of legal age, and am a clerk employed in the store of C. P. Case, 597 Albany Ave., Hartford, Connecticut. I saw the Beech-Nut cigarettes displayed last spring. I thought they were a product of the Beech-Nut Packing Company on account of the label thereon and I bought a package of the cigarettes, expecting to get a good smoke. I never bought another package. I have never seen a package of Beech-Nut scrap tobacco before I was shown one today.

On cross-examination the witness would testify as follows:

When I purchased these cigarettes, I did not ask for cigarettes made or put out by the Beech-Nut Packing Company but simply asked for a package of Beech-Nut cigarettes. I did not examine the package and therefore did not notice the name P. Lorillard Co. appearing thereon, nor did I make any direct comparison of the label on the Beech-Nut cigarettes with the label, such as appears on the products of the Beech-Nut Packing Company, with which I am familiar. I only bought this one package of cigarettes.

I would not be confused or deceived into purchasing or accepting these Beech-Nut cigarettes if I asked the dealer for Beech-Nut chewing gum or for any of the food products of the Beech-Nut Packing Company.

#### STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if P. LYNCH was called, he would testify as follows:

My name is P. Lynch; I am of legal age, and am a clerk employed in Burnham's Market, West Hartford, Conn. I have seen Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1. When I first saw these cigarettes I thought they were a product of the Beech-Nut Packing Company and I bought a package and expected to get an exceptional smoke. I am familiar with Beech-Nut products and have always been satisfied with every Beech-Nut product I have bought. I did not buy another package of the cigarettes. I was first informed that these cigarettes were not a product of the Beech-Nut Packing Company by Mr. Ray, a representative

of the Beech-Nut Packing Company, a few days prior to testifying.

On cross-examination the witness would testify as follows:

When I purchased the pack of cigarettes I did not ask for cigarettes made by the Beech-Nut Packing Company but merely for a package of Beech-Nut cigarettes and made no particular examination of the package and therefore did not notice the name P. Lorillard Co. appearing thereon. That I would not be confused or deceived into accepting these Beech-Nut cigarettes as and in the place of Beech-Nut chewing gum or any Beech-Nut food product. That I have never seen a package of Beech-Nut scrap tobacco.

#### STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if R. J. ANDREWS was called, he would testify as follows:

My name is R. J. Andrews; I am of legal age, and am employed in the store of J. Burnham, West Hartford, Connecticut. I have seen the Beech-Nut cigarettes advertised and on display in Hartford, Connecticut, since last spring when the cigarettes first came out. I bought a package in the belief that they were a Beech-Nut Packing Company product. I never bought another package of these cigarettes. I continued to believe that these cigarettes were a product of the Beech-Nut Packing Company until I was advised a few days ago by Mr. Ray of the Beech-Nut Packing Company that the Beech-Nut Packing Company had nothing to do with them.



On cross-examination the witness would testify as follows:

I did not ask for Beech-Nut cigarettes of the Beech-Nut Packing Company when I made the purchase but simply asked for a package of Beech-Nut cigarettes. I did not examine the package particularly and therefore did not notice the name P. Lorillard Co. appearing thereon. I would not be confused or deceived into accepting or purchasing a package of these Beech-Nut cigarettes if I asked for and wished Beech-Nut chewing gum or any Beech-Nut food product.

#### STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if JOHN MEAD was called, he would testify as follows:

My name is John Mead; I am of legal age, and am employed as a clerk in Preston's market on Asylum Street, Hartford, Connecticut. I have seen the Beech-Nut scrap tobacco on display and have bought a few packages of it and always thought it was a Beech-Nut product, made by the same people that make the gum and other Beech-Nut products. I have seen the Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1, advertised and on display in Hartford, Connecticut, since the spring of 1921 and thought that these were made by the same people who made the Beech-Nut gum and other food products. I was first informed that neither the Beech-Nut scrap tobacco or the Beech-Nut cigarettes were a product of the Beech-Nut Packing Company, on August 30th, 1921, by Mr. Ray, a representative of the Beech-Nut Packing Company.

On cross-examination the witness would testify as follows:

I never made any examination of the Beech-Nut scrap tobacco package and did not notice the name Lorillard thereon. I have never purchased a package of the Beech-Nut cigarettes and have not paid any particular attention to the same. I would not be confused or deceived into buying either Beech-Nut scrap tobacco or Beech-Nut cigarettes in place and instead of Beech-Nut gum or any Beech-Nut food product.

#### STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if JAMES MATREACE was called, he would testify as follows:

My name is James Matreace; I am of legal age, and reside at 80 Village Street, Hartford, Connecticut. I am a clerk in the store of O. Matreace, Hartford, Connecticut, a grocery and general store, and have at various times bought and do buy tobacco supplies for this store. In the spring of 1921 a salesman came around and urged me to stock Beech-Nut cigarettes. When I saw the cigarettes I took them to be the product of the Beech-Nut Packing Company by reason of the label thereon. I put in the cigarettes because I thought they were the Beech-Nut Packing Company's product and would sell because the other Beech-Nut products we had were selling well. I continued to believe that these cigarettes were a product of the Beech-Nut Packing Company until August 28th, 1921, when I was told by Mr. Ray, a salesman for the Beech-Nut Packing Company, that these cigarettes were not the product of the Beech-Nut Packing Company but were the product of

the P. Lorillard Co. I have sold these cigarettes myself over the counter.

On cross-examination the witness would testify as follows:

I am merely an employee in this store and it is a small store, employing about four persons. I do not know from whom I purchased the first of the Beech-Nut cigarettes as I did not ask the salesman what company he represented but I have since bought these cigarettes from jobbers in Hartford. At the time I purchased the first order of cigarettes I did not ask the salesman if they were made by or if they were a product of the Beech-Nut Packing Company nor did I examine them or observe the name P. Lorillard Co. thereon. I know the P. Lorillard Company is a large tobacco concern and I have handled other products of theirs and if I had seen the name P. Lorillard Co. on the package I would have presumed it was their product. I never paid any particular attention to the matter but simply bought the cigarettes from time to time and sold them over the counter. I never made a direct comparison of the label on the Beech-Nut cigarettes with that of the Beech-Nut Packing Company. We are still selling the Beech-Nut cigarettes in this store. We sell certain products of the Beech-Nut Packing Company, such as food products, and if a man came into this store and asked me for a food product of the Beech-Nut Packing Company I would not hand him or sell him the Beech-Nut cigarettes in place of the food products but would give him what he asked for, nor would I myself be confused or deceived into taking Beech-Nut chewing gum or Beech-Nut food products for and in the place of the Beech-Nut cigarettes or vice versa.

HARRY W. AVERY (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Harry W. Avery; you are 34 years of age; your residence is South Windham, Connecticut; you are a salesman employed by the Beech-Nut Packing Company; is that correct?

A. Yes.

Q. 2. I show you a package of Beech-Nut cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes) which is in this case as Plaintiff's Exhibit No. 1. Have you seen these cigarettes before; if so, when did they first appear in your territory?

A. I have seen them before, I should say last spring, about March.

Q. 3. What is your territory, Mr. Avery?

A. Eastern Connecticut, the four eastern counties, Windham, Tolland, Middlesex and New London counties.

Q. 4. Did you see these cigarettes in stores and advertising and posters of the cigarettes?

A. Yes, I have.

Q. 5. To what extent have you seen these displayed?

A. I have seen the cigarettes displayed to a very great extent in many stores, in practically all the stores in fact. I have seen a great deal of poster advertising and I have seen some newspaper advertising.

Q. 6. Have you heard any comments, remarks or inquiries as you went around on your route, about these cigarettes; if so, please state what these comments, remarks or inquiries were?

A. I have heard comments and remarks. The question has been asked me many, many times, "How long have

you been in the cigarette business?" "If they are as good as the rest of your products they will certainly sell."

Q. 7. Have you ever been asked for these cigarettes?

A. I have. I have been asked many times for samples of Beech-Nut cigarettes.

Q. 8. Will you tell me what has happened when you have been asked for samples of Beech-Nut cigarettes?

A. A man named Timmons—he called to me when I was standing beside my machine—my company car.

Q. 9. What is on that car?

A. The Beech-Nut label and besides that the Beech-Nut Packing Company is printed on there in big gold letters—letters, I should say, 6 inches high. Mr. Timmons asked me for samples. I gave him samples of Beech-Nut gum. He said, "No, I didn't mean gum, I meant cigarettes."

Q. 10. Where was this, and when was this?

A. Willimantic, at the corner of Main and Bridge street, about a week and a half ago, less than two weeks ago.

Q. 11. Have you had other requests for samples of cigarettes?

A. I have many times been asked by truck drivers on the road, by young men standing in the streets when I stopped in front of stores.

Q. 12. You have testified to comments, remarks and inquiries which you have heard about these cigarettes and indicated the nature thereof. Will you give me a conservative estimate of the number of times this has happened?

A. Why, I should say conservatively hundreds of times. I have no means of getting at the exact number, but it is an everyday occurrence, a frequent occurrence.

Q. 13. Is it still going on?

A. It is, yes.

Q. 14. Can you give me some more particular instances of cases where you have heard this kind of comment, remarks or inquiries? I do not want any instances except those where you can give me definitely the names of the persons who made the comments or remarks, the place and approximately when it happened.

A. Mr. Bidwell, of the Bishop & Bidwell Co., wholesale grocers, of Norwich, I should say about two weeks ago, asked me how long we had been in the cigarette business. I said, "We are not in the cigarette business." He said, "I thought you were in the cigarette business." I said, "I have sold——"

Q. 15. I don't want the whole conversation. Can you give me any other instances of this character?

A. Mr. Pendleton, clerk in the Mohican Hotel, in New London. This was possibly last April, it was shortly after they came out that he said this: "How long have you been in the cigarette business? How long have you been making cigarettes?" Mr. Hall, F. Lewis Hall, he is the State Factory Inspector in Connecticut, told me, I should say two weeks ago; shall I state what he told me in his exact words, or just what he told?

Q. 16. Well, I don't want a long conversation, if you can remember what the man said, tell it.

A. He said, "I have been using your cigarettes." I said, "They are not our cigarettes." He said, "I thought I was helping you by buying your cigarettes."

Q. 17. All right. Give me another one.

A. Mr. Foss, Frank Foss, he is judge of the Police Court in Willimantic.

Q. 18. Where?

A. Willimantic.

Q. 19. What did he say?

A. He said, "I have been helping you out by buying your cigarettes." I said, "They are not our cigarettes." He said, "I thought they were."

Q. 20. Can you remember any other definite instances of this character at the present time?

A. Mr. Johnson, Frank Johnson, of the M. P. Johnson Co., of New London, asked me recently—I can't give you the exact date, I can't recall just when it was—asked me how long we had been in the cigarette business; how long we had been making cigarettes?

Q. 21. Yes.

A. I have been asked this question many, many times, innumerable times, where I can't recall the person or the date.

Q. 22. I show you a package of Beech-Nut scrap tobacco (Mr. Hinton shows witness a package of Beech-Nut chewing tobacco), which is in this case as Plaintiff's Exhibit No. 3. Have you seen this scrap tobacco displayed in your territory, Mr. Avery?

A. I have.

Q. 23. To what extent have you seen it displayed in comparison with the cigarettes?

A. Not nearly as much I should say as the cigarettes; not nearly as much I should say.

Q. 24. Have you seen it, however, many times?

A. I have.

Q. 25. Did you ever see the name of the manufacturer on this scrap tobacco?

A. I have.

Q. 26. When did you first see the name of the manufacturer on the scrap tobacco?

A. Yesterday.

Q. 27. Did you ever previously buy a package of this scrap tobacco?

A. I did.

Q. 28. How long ago was that?

A. I should say it was nearly five years ago.

Q. 29. Why did you buy this package of scrap tobacco, do you remember?

A. The label attracted my attention. I noticed it in a store. I thought it was the same label as ours; it appeared to me as being the same label as ours.

Q. 30. When did you first know who made this scrap tobacco?

A. Yesterday.

Q. 31. Have you ever heard any comments, remarks or inquiries or the like about this scrap tobacco?

A. I have.

Q. 32. And what has been the nature of those remarks?

A. The remark has been made to me many times, "I am surprised to see your label on a package of goods of that nature."

Q. 33. Can you give me any particular instances where you can state the names of the persons who made the remarks; remarks or comments or inquiries made to you with respect to the scrap tobacco?

A. Recently, while at A. M. Bowers' store, in Eastford, Connecticut, Mr. Bowers' son said, "How long have you been in the tobacco business?" I said, "We are not in the tobacco business." He said, "I thought you were."

Q. 34. I don't want the entire conversation, Mr. Avery. Can you give any other instances?

A. Yes, in the store of De Garra & Son, New London, Mr. De Garra's brother said, "How long have you been making tobacco?" He also combined that with cigarettes. He seemed surprised to learn that we did not make the tobacco.

Q. 35. Can you recall any other instances of this?

A. There have been many, many instances that I can't recall.

Q. 36. I think that is all, I may have one or two questions later.

Direct examination closed.



*Cross-Examination by Mr. Cavanagh.*

X-Q. 37. How long have you been employed by the Beech-Nut Packing Company?

A. Very nearly six years.

X-Q. 38. You are familiar with their complete line of products?

A. I am.

X-Q. 39. Do you handle the entire line of products?

A. I do.

X-Q. 40. Through this territory of Connecticut, as I understand it?

A. Eastern Connecticut; it is called the Eastern Connecticut territory.

X-Q. 41. You have referred to a number of conversations you had with different parties about Beech-Nut cigarettes and Beech-Nut scrap tobacco, which are here in evidence. As I understand it, in no instance did you repeat the entire conversation you had with the parties, did you?

A. I did not, no, not the entire conversation, because it drifted off into other things.

X-Q. 42. And two or three times Mr. Hinton stopped you and told you he did not want the entire conversation about the matter, didn't he?

A. Well, that was possibly so, yes.

Mr. Hinton: I simply stopped the witness because I did not think a long conversation would be competent evidence in this case.

Mr. Cavanagh: Objection is now made to all the testimony of this witness relative to any conversations he had with other parties relative to Beech-Nut scrap tobacco or Beech-Nut cigarettes on the ground that same is incompetent, and, furthermore, is not including the entire conversation, but merely detached portions thereof.

X-Q. 43. When did you first examine a package of those cigarettes?

A. I should say in March, last spring, 1921. I couldn't say definitely the exact date, it might have been April.

X-Q. 44. Did you look at the package carefully?

A. I did.

X-Q. 45. You saw the name P. Lorillard Co. on the package, did you?

A. I did.

X-Q. 46. You knew then it was Lorillard's product?

A. I knew before then it was not our product. Of course, when I saw the name P. Lorillard Co., I knew it was a Lorillard product?

X-Q. 47. And that it was not a product of the Beech-Nut Packing Company?

A. I did know it was not a product of the Beech-Nut Packing Company.

X-Q. 48. Before you ever saw a package?

A. I did.

X-Q. 49. You simply heard the cigarette was on the market?

A. I did not, I heard nothing about it.

X-Q. 50. Well, just tell me exactly how you first found out these Beech-Nut cigarettes were not a Beech-Nut product.

A. I knew it was not a Beech-Nut Packing Company product because the company always sent us samples and data on new products they are putting out.

X-Q. 51. Now, just tell me how you first came to know of this Lorillard Beech-Nut cigarette.

A. I saw it in a store.

X-Q. 52. All right, we will start there; you saw it in a store?

A. I did.

X-Q. 53. You had heard of it before then?

A. I had not.

X-Q. 54. When you saw it in the store, you looked at it, didn't you?

A. I did.

X-Q. 55. Then you saw it was a Lorillard cigarette, and not the Beech-Nut Packing Company's cigarette?

A. Before I saw it was a Lorillard cigarette, the label appeared to me as being our label. I bought it for the purpose of seeing who made it, and also for the purpose of sending a package in to the house.

X-Q. 56. So that the first thing you ever knew about that cigarette at all was when you saw it?

A. Yes

X-Q. 57. And you immediately purchased a pack?

A. I did.

X-Q. 58. You then saw it was not a Beech-Nut Packing Company product?

A. After an examination I did, yes.

X-Q. 59. As soon as you examined it?

A. Yes.

X-Q. 60. Now, you have spoken something about a label; you have a label on your car, haven't you?

A. I have.

X-Q. 61. Will you just describe that label to me?

A. That is a label, the label itself is a circular label, an oval label, it has Beech-Nut food products on it. It has a nut on it, and in very, very fine black letters at the bottom—I wouldn't say very fine, but in fine letters at the bottom Beech-Nut Packing Company, Canajoharie, N. Y.

X-Q. 62. Now, describe that oval to me.

A. In what respect, Mr. Cavanagh?

X-Q. 63. As far as the width or dimensions or color are concerned.

A. Why, that oval on my car, I should say, was a foot and a half long and possibly a foot high. It is quite a big oval, it is not the standard letters that they use.

X-Q. 64. What is the color of the oval?

A. It is red and gold.

X-Q. 65. It has a red band in it?

A. There is some green in it, some black in it.

X-Q. 66. There is a red band, isn't there?

A. There is, yes.

X-Q. 67. How wide is that red band?

A. Why, I couldn't say exactly in inches. Possibly two and a half inches, possibly a little less than that. The label on my car, Mr. Cavanagh, I tell you frankly, is not the standard Beech-Nut advertised label, it was a label printed on there in New Haven. It may not be exactly like the standard Beech-Nut label.

X-Q. 68. I show you, Mr. Avery, a small jar of Beech-Nut peanut butter (Mr. Cavanagh shows witness jar of Beech-Nut peanut butter), which is in this case as marked for identification, Defendant's Cross-Exhibit No. 7, and it has a label on it. Can you tell me whose product that is?

A. The Beech-Nut Packing Company's.

X-Q. 69. And that is the Beech-Nut standard label?

A. That is the standard label.

X-Q. 70. Now, this label has a wide red band on it, has it?

A. It has.

X-Q. 71. And you always recognize that in connection with the Beech-Nut products, don't you?

A. Why, possibly so, yes, I am so familiar with the Beech-Nut label that I perhaps wouldn't notice the red label.

X-Q. 72. But this red label has printed on it, it is a wide red label with printing on it?

A. Yes.

X-Q. 73. Isn't it one of the salient things that would strike your eye in the Beech-Nut label?

A. Yes, it is, but those labels become faded, I have found in many instances where the red was entirely faded out.

X-Q. 74. On old goods?

A. Yes, on old goods that have been wet.

X-Q. 75. But that has the brand printed on it?

A. Yes, when they left the factory.

X-Q. 76. And that wide red band is not found on the Beech-Nut cigarettes?

A. No, that wide red band isn't on it.

X-Q. 77. With the printing on it?

A. No.

X-Q. 78. Now, you are a Beech-Nut salesman; when you saw that label you know that wasn't the standard label of the Beech-Nut Packing Company, didn't you?

A. I didn't see that label in the condition the package is in now when I saw that label.

X-Q. 79. You saw the word Beech-Nut?

A. Yes, I saw the word Beech-Nut; that was what attracted my attention.

X-Q. 80. That attracted your attention?

A. Yes.

X-Q. 81. So, when you picked that up, you saw it wasn't your label?

A. Yes, I would know it wasn't our label.

X-Q. 82. Just before we leave the cigarette, have you ever bought any of these cigarettes?

A. Yes.

X-Q. 83. And smoked them?

A. Smoked one package.

X-Q. 84. You don't prefer that brand, do you?

A. I do not, not because it is made by Lorillard, that is not the idea, but the flavor doesn't appeal to me.

X-Q. 85. You smoked other cigarettes of Lorillard's make?

A. I say "yes," I have smoked a great many different kinds of cigarettes. I have probably undoubtedly smoked Lorillard's cigarettes.

X-Q. 86. You have smoked Murads?

A. Yes.

X-Q. 87. Moguls?

A. Yes.

X-Q. 88. Egyptian Deities?

A. Yes.

X-Q. 89. And, of course, you know, as a smoking man, that various individuals have various tastes and preferences to brands?

A. I do.

X-Q. 90. You have never heard of the Beech-Nut Packing Company selling tobacco products, have you?

A. I never did.

X-Q. 91. Cigarettes or scrap tobacco either?

A. No.

X-Q. 92. And I take it that when any of these parties that you have mentioned, asked you about the Beech-Nut cigarettes or Beech-Nut scrap tobacco, as to whether the Beech-Nut Packing Company had put it on the market, or had gone into the tobacco business, you told them it wasn't your brand?

A. I did.

X-Q. 93. You told them it was the Lorillard Company?

A. I did not.

X-Q. 94. What did you tell them?

A. I have probably in some instances told them the cigarette was Lorillard's, but I have simply denied we put the cigarette out or the tobacco. In some instances I told them possibly that Lorillard did make the cigarette.

X-Q. 95. Well, as a salesman, if a man came to you and said that he wanted to get from you a dozen cartons of

these Beech-Nut cigarettes—of the Beech-Nut cigarettes—you wouldn't take that order?

A. No, I would not.

X-Q. 96. You would simply tell that man, as an honest salesman, that your company did not make the cigarette?

A. No, sir.

X-Q. 97. You never have taken such an order for them?

A. No, sir.

X-Q. 98. Now, on this scrap tobacco package, to cut this matter short, you never, in all your connection with the Beech-Nut Packing Company, saw any Beech-Nut product resembling that in ornamentation or dress, did you?

A. I have never—I, of course, would know that was not the Beech-Nut label.

X-Q. 99. Yes, but I mean you have never seen a Beech-Nut Packing Company product with those red radiating lines in a sunburst arrangement, have you?

A. I have not.

X-Q. 100. They are very prominent on that package?

A. They are.

X-Q. 101. And meet on a single line from a blue oval?

A. Yes, sir.

X-Q. 102. You don't know of any arrangement on any of your Beech-Nut packages like that, do you?

A. I do not, no.

X-Q. 103. And as I understood, it was about five years ago you first purchased a package of this?

A. I couldn't say approximately. I could tell exactly by looking up old correspondence with the firm, I could tell the exact date.

X-Q. 104. I mean approximately, Mr. Avery; I don't want to hold you too exactly in this examination.

A. I should say roughly five years ago.

X-Q. 105. When you say you examined this package, you saw the name Lorillard on it?

A. No.

X-Q. 106. Then you didn't examine it very carefully?

A. I did and I didn't. If the name was there, I evidently overlooked it.

X-Q. 107. You knew the P. Lorillard Co. was a large tobacco manufacturing concern, did you not?

A. I do.

X-Q. 108. And if you had really examined this package, you would have noticed that it had on it—that it was made by Lorillard?

A. I didn't notice that.

X-Q. 109. You would have noticed the name P. Lorillard Co. on the front?

A. If the name Lorillard was on it I evidently overlooked it, because I bought a package yesterday for the express purpose of finding out what name was on it.

X-Q. 110. You have been assisting counsel for the Beech-Nut Packing Company in collecting evidence in this case, haven't you?

A. No, sir, aside from being chauffeur for his machine; that's all. I drove the machine around a lot for him, and I went into a store with him once.

X-Q. 111. So you haven't attempted to get any evidence except once?

A. I went into a store with him and he asked me not to go into any more.

X-Q. 112. Yesterday, on the street in the city of Hartford, didn't you stop a gentleman, who looked like a Hebrew peddler?

(Witness interjects.) No, sir; he stopped himself—

X-Q. 113. I stand corrected. Didn't a peddler stop



at your car when Mr. Cavanagh was present and try to sell some cigarettes?

A. Yes, he did.

X-Q. 114. And didn't you have some conversation with him about them?

A. Yes, I recall that now; I didn't think of it at the time you asked the question.

X-Q. 115. And then didn't you go to Mr. Hinton and tell him about this peddler?

A. I can't recall just what I said to him.

X-Q. 116. You thought he might be a witness?

A. Yes, I thought he might be a witness.

X-Q. 117. So you would help him out?

A. Yes, I didn't think of that at first, but the man's testimony wasn't used.

X-Q. 118. Before you went with the Beech-Nut Packing Company, did you ever sell any other products?

A. I sold crackers and other things.

X-Q. 119. Did you ever sell tobacco products?

A. In retail stores.

X-Q. 120. But I mean in your capacity as a road salesman visiting the trade?

A. No.

X-Q. 121. You simply sold them in retail stores along with other things?

A. Yes.

X-Q. 122. If you went into a customer's store and he gave you an order, say, for 100 boxes of Beech-Nut gum or 50 cases of Beech-Nut peanut butter, would you send that man, in filling his order, 100 cartons of Beech-Nut cigarettes or 100 cartons of Beech-Nut scrap tobacco?

A. No.

X-Q. 123. In other words, you wouldn't send to that man a tobacco product in the place of any of the Beech-Nut products which you are now selling or handling at this time, would you?

A. I would not.

X-Q. 124. Did you ever know of any customer or person who went into a store and said, "I want a package of cigarettes made by the Beech-Nut Packing Company"?

A. I do not.

X-Q. 125. And was handed a package of these Lorillard cigarettes?

A. I do not; that is, not asked in that way, no.

X-Q. 126. And you never knew of any person who wanted gum or any other Beech-Nut Packing Company product which you handle at this time and who was confused or deceived into taking the Beech-Nut cigarette or Beech-Nut scrap tobacco in the place of it, do you?

A. Why, I do not; no, I don't know of a case where they went in to buy gum and took cigarettes instead. No, I do not. A person wanting gum would not necessarily want cigarettes.

*Re-Direct Examination by Mr. Hinton.*

R-D. Q. 127. Mr. Cavanagh has asked you about this Hebrew peddler, who peddled cigarettes, who came up to you yesterday and you testified that you called me over and talked to him. Why did you call me over to talk to him?

A. Why did I call you over?

R-D. Q. 128. Yes.

A. I called you over to talk to him because I asked him if he had Beech-Nut cigarettes. He said, "No, I am all sold out." I said, "Who makes them?" He said, "The Beech-Nut Company." I called Mr. Hinton over to talk to him then.

Re-direct examination closed.

*Re-Cross Examination by Mr. Cavanagh.*

R-X Q. 129. This party was rather a suspicious looking customer, wasn't he?

A. Why, I held on to my watch.

Signature of witness waived.

Deposition closed.

E. IRVING RAY (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is E. Irving Ray, your age is 31, your residence is 50 Union Street, Meriden, Connecticut, you are a salesman for the Beech-Nut Packing Company; is that correct?

A. Yes.

Q. 2. How long have you been employed by the Beech-Nut Packing Company, Mr. Ray?

A. About a year ago, the 15th of last February.

Q. 3. What territory do you cover?

A. Northern Connecticut.

Q. 4. I show you a package of cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1. Do you remember when these cigarettes first came out in your territory?

A. Why, about this spring, I should say, in March.

Q. 5. Have you heard any comments, remarks or inquiries about these cigarettes as you have gone about your work; if so, please indicate the nature of these comments, remarks or inquiries?

A. I have heard hundreds of different people that I have seen, such as clerks, say, "Well, I see you people are putting out cigarettes now. What next line are you

going into?" and "How are the cigarettes selling with you?" and many other different comments of the same similar sort.

Q. 6. Do you drive a Beech-Nut Packing Company car?

A. No, except when I am with Mr. Peters in his car.

Q. 7. Will you kindly give me some particular instances of your having heard this kind of comments or remarks? I want you to give me only instances where you can state definitely the name of the person and accurately what he said.

A. Well, Mr. Austin in Waterbury, at the Hotel Kingsbury, on my purchase of a package of Camels, didn't seem to understand why I shouldn't smoke my own brand of cigarettes and passed a remark to that effect.

Q. 8. Do you remember what his exact words were?

A. As near as I can remember, he says, "I should—" oh, he says, "We are stocking your brand of cigarettes now, don't you want a deck of them?" I says, "No," I says, "I prefer Camels." "Well," he says, "I don't know why you don't smoke your own brand."

Q. 9. Did you tell him that the Beech-Nut Packing Company did not make these cigarettes?

A. I did after the conversation.

Q. 10. Can you give me any other instances?

A. Why, Mr. Austin's son, on being offered a Camel by me, stated he didn't see why I didn't smoke Beech-Nut cigarettes and he didn't smoke cigarettes himself, but he didn't see why I didn't smoke my own brand of cigarettes.

Q. 11. All right. Give me another instance.

A. Why, Mr. Young and Mr. Andrew of M. J. Burnham's, West Hartford, asked me how long we had been in the tobacco game, the cigarette game, and I told him they weren't our product.

Q. 12. What's that?

A. I told him they weren't our product after that.

Q. 13. All right. Can you remember any more?

A. Mr. Harry Eustace of the Sigourney Grocery Company asked me how they were selling, as near as I can remember, and he asked me if they were made by us and I told him they weren't.

Q. 14. Any others?

A. Mr. Loury, out to C. P. Case's, asked me about the cigarettes and—well, his conversation was I see that we bring out a cigarette and couldn't understand it when I told him it wasn't a Beech-Nut cigarette.

Q. 15. Do you recall any further instance of this same sort of thing? Please give the name of the man and try to tell exactly what he said; also where it was.

A. Mr. Mazacotti in Meriden asked me how—he said, "That Beech-Nut cigarette should sell," seeing that the rest of the products did, gum for instance, mostly. Mr. Cashman, Mulberry Street, Hartford, asked me a couple of times about the cigarettes. I informed him in the first instance, I remember; he asked me about how long we were making them. I guess that's about all I can recall at this time.

Q. 16. How long did you say you have been working for the Beech-Nut Packing Company?

A. A year about the 15th of last February, I started.

Q. 17. Prior to your being employed by the Beech-Nut people, had you ever seen this Beech-Nut scrap tobacco (Mr. Hinton indicates package of Beech-Nut chewing tobacco), which I now show you, which is in this case as Defendant's Cross-Exhibit No. 1.

A. Yes, I had an instance—

Q. 18. Do you remember whose product you thought it was?

A. Why, I didn't give it any thought until I was

about to go to work for this company. I felt it would be one of the products I would sell at the time. I didn't know but I thought it was, being Beech-Nut, it was a Beech-Nut product at that time. Of course I—

Q. 19. What's that?

A. I had not thought otherwise at the start until I took up this work; I thought the tobacco was a product of the Beech-Nut Company.

Q. 20. To what extent have you seen Beech-Nut scrap tobacco displayed in your territory in comparison with the cigarettes?

A. Not to anywhere near great an extent as the cigarettes. To a certain extent, of course.

Q. 21. That is all for the direct examination. Now Mr. Cavanagh will have a few questions.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 22. Mr. Ray, you have related a number of instances of people, who spoke to you about the Beech-Nut cigarette and in connection with that, whether it was put out by the Beech-Nut Packing Company. Do you know of your own knowledge if any of these people took the trouble to examine that package of cigarettes before they asked you that question?

A. No, I don't.

X-Q. 23. You smoke, don't you?

A. Yes, lots of them.

X-Q. 24. Do you smoke cigarettes?

A. Yes.

X-Q. 25. Will you kindly mention some of the brands you have smoked?

A. Why, I think for the past three years I have smoked Camels; previous to that—well, I have smoked them pretty near as soon as they come out; I don't know just how long it has been.

3  
6  
3

X-Q. 26. Did you ever smoke Murads or Moguls?

A. Perhaps once or twice; never to any great extent.

X-Q. 27. Egyptian Deities?

A. I don't believe I have ever smoked Egyptian Deities.

X-Q. 28. Do you know of the P. Lorillard Co., do you?

A. Why, yes.

X-Q. 29. You know they are a large tobacco manufacturing concern and put out various brands of cigarettes?

A. Yes.

X-Q. 30. This name, P. Lorillard Co., on this package of cigarettes would indicate to you that it was one of their brands?

A. Yes.

X-Q. 31. And if the name Beech-Nut Packing Company is not on that package any place, that would indicate to you that it is not their cigarettes, would it not?

A. Well, it would, yes, if I examined the package closely and found P. Lorillard on it.

X-Q. 32. But on all products of Beech-Nut Packing Company you handle—take, for instance, this glass jar of peanut butter (Mr. Cavanagh shows witness glass jar of Beech-Nut peanut butter) which I show you and which is in this case as Defendant's Exhibit No. 7 for identification, the name Beech-Nut Packing Company, Canajoharie, N. Y., appears on it?

A. It does.

X-Q. 33. And that is the practice with all their products, as far as you know?

A. Yes.

X-Q. 34. Do you handle the Mohawk and Erie and Holly brands for the Beech-Nut Packing Company?

A. Yes, but I have never sold any—they handle them, the company itself, but I have never sold any but the Erie.

X-Q. 35. That doesn't bear the Beech-Nut label, similar to this on the peanut butter, does it?

A. No, not that I know of.

X-Q. 36. You have seen the goods?

A. Yes, oh yes.

X-Q. 37. Do you chew tobacco? You never have chewed any of this Lorillard Beech-Nut scrap?

A. No.

X-Q. 38. When did you first see a package of this Lorillard Beech-Nut scrap?

A. It is a long time ago. I don't know; I can't just recall how many years; it must have been a few years ago.

X-Q. 39. You didn't pay any attention to it?

A. No.

X-Q. 40. You didn't examine it, did you?

A. No, I never did.

X-Q. 41. Now, as I understand it, this Beech-Nut label on the peanut butter is a good representation of their standard label, as far as you know?

A. Yes.

X-Q. 42. And that label contains a wide red band with printing on it, above and below the oval, does it not?

A. Yes, it does.

X-Q. 43. Now, as you look at this Beech-Nut scrap tobacco package, to which Mr. Hinton called your attention, you see it has got a single blue lined oval, from which wide radiating red lines run out like a sunburst, do you not?

A. Yes.

X-Q. 44. You don't know of any Beech-Nut product



that you handle that has any such a dress or decoration, do you?

A. Not the sunburst part, no, I don't.

X-Q. 45. And the sunburst runs out from a single lined blue oval?

A. No, I don't.

X-Q. 46. Now, on this package of Beech-Nut cigarettes you don't find a wide red oval band with any printing on it, do you?

A. No, not on close examination, no.

X-Q. 47. But just look at the thing; you are familiar with the Beech-Nut label, of course?

A. No.

X-Q. 48. That don't look like your Beech-Nut label?

A. No, but if I wasn't so close, if I looked at it at a distance, the Beech-Nut would look just the same.

X-Q. 49. Is it the beech-nut that attracts your attention or the wide red band?

A. The word "Beech-Nut" naturally and the cluster on it.

X-Q. 50. But this cluster on the peanut butter, the Beech-Nut Packing Company has a single nut imposed on three green leaves, has it not?

A. Yes.

X-Q. 51. And here there are two nuts without any leaves and with red and gold?

A. Yes.

X-Q. 52. Is that right?

A. Yes.

X-Q. 53. Now, we will get back to that outline of the oval; isn't it a fact, Mr. Ray, that one of the things that would attract your attention is the fact that the Beech-Nut Packing Company label has a wide red oval?

A. Not necessarily. I wasn't attracted by that; I never gave that a thought; the red oval part was simply

—the beech-nut is exactly the same except that it is red here and white here, to me.

X-Q. 54. Do you mean the word beech-nut?

A. The word beech-nut, yes.

X-Q. 55. That was what you were talking about in your last answer?

A. Yes. But on examining it, I know, of course.

X-Q. 56. But I was talking about that red oval. Now you have ridden around with Mr. Peters, in his car, haven't you?

A. Yes.

X-Q. 57. And he has a Beech-Nut sign on the side of that car?

A. Yes.

X-Q. 58. And haven't there been times when you were on the street and were looking for his car, when you would see that red oval at a distance and recognize his car among the others?

A. Why, yes, I think, as near as I can remember, now, Mr. Peters is a full body of red.

X-Q. 59. But you can see that at a distance, that red oval?

A. Why, yes, you can see it at a distance.

X-Q. 60. I understand you sell the Beech-Nut Packing Company's products, do you not?

A. Yes.

X-Q. 61. Their complete line?

A. Yes.

X-Q. 62. That is, you sell all their products; you sell chewing gum and ginger ale?

A. Yes.

X-Q. 63. And things of that sort?

A. Yes.

X-Q. 64. Did you ever know of any person who wanted to purchase a Beech-Nut food product or Beech-

Nut chewing gum or Beech-Nut ginger ale and who was confused or deceived into accepting a package of this Beech-Nut scrap tobacco or Beech-Nut cigarettes in place of their food products?

A. No, I can't say that I do know of any such specific instance of that sort.

X-Q. 65. Would you, yourself, if you went into a store and wanted to buy, say, a package of Beech-Nut chewing gum or a package of this Beech-Nut peanut butter, which I show you (Mr. Cavanagh indicates a glass jar of Beech-Nut peanut butter), you wouldn't be fooled into taking a package of cigarettes for the chewing gum or peanut butter when you wanted those?

A. No.

X-Q. 66. You never knew of any person being fooled on goods like that?

A. No.

X-Q. 67. And you don't know of any instance where a person went in and said, "I want a package of cigarettes, made by the Beech-Nut Packing Company," and the man sold him the Lorillard cigarettes?

A. No; I can't say I do.

X-Q. 68. You yourself never tried to tell anybody that the Beech-Nut Packing Company made these cigarettes?

A. No.

X-Q. 69. You told them they were made by—?

A. Why, I told them Lorillard.

X-Q. 70. In other words, as a fair salesman, when inquiries were made, you always told them who the goods were made by?

A. Yes.

X-Q. 71. You were speaking of a man by the name of Cashman who asked you a couple of times about this?

A. Yes.

X-Q. 72. On the first occasion, what did he ask you?

I don't want the exact words, just substantially what he asked you.

A. Well, I don't know as I can tell you the exact words. I know he asked me in a certain way how long we had been putting out cigarettes, and of course, as he was very busy, I walked along. I didn't stop to talk to him.

X-Q. 73. What did you tell him?

A. I didn't talk to him at that time at all. There was another time when he asked me in regard to the cigarettes; I told him it was a Lorillard product.

X-Q. 74. So that the first time he just put that question to you as you went by?

A. No. I very seldom have a talk with Mr. Cashman, for any length of time. He is a very busy man.

X-Q. 75. At any time anybody would ask you and you had time to talk to him, you told them they were not made by the Beech-Nut Packing Company, but by the Lorillard Co.?

A. Yes.

X-Q. 76. You have been assisting counsel for the Beech-Nut Packing Company in looking up and collecting evidence in this case, haven't you? That is, interviewing parties?

A. I have not interviewed them to any extent. I have introduced Mr. Hinton to parties.

X-Q. 77. That you have talked to first?

A. I haven't talked to people with Mr. Atkinson.

X-Q. 78. You and Atkinson went around and saw parties who you thought might know something about the case and then referred them to Mr. Hinton?

A. Yes.

Cross-examination closed.

Signature of witness waived.

Deposition closed.

## STIPULATION.

It is stipulated by and between the parties, through their respective counsel, that if T. J. LENAHAAN was called, he would testify as follows:

My name is T. J. Lenahan; I am of legal age; I am the proprietor of a cigar store near the railroad station in Hartford, Connecticut, and employ two people. I have handled the Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1. I have heard people say over the counter a considerable number of times in connection with these cigarettes, "What are these people going to come out with next? If these cigarettes are as good as the gum, they are all right." I have handled Beech-Nut scrap tobacco, similar to plaintiff's exhibit, for about two years, and I have been selling very little of this. I never noticed the name P. Lorillard Co. on the package of scrap tobacco. I buy through the jobbers and did not know who makes the scrap tobacco.

On cross-examination the witness would testify as follows:

I never took the trouble of examining the scrap tobacco package to see what name was on it, and therefore if I had examined it, I would have seen Lorillard's name there and would know it was a product of the P. Lorillard Co., well known tobacco manufacturers, and further than this, I myself, did not believe that the tobacco was a product of the Beech-Nut Packing Company, but didn't pay any attention to the matter, and, not having examined the package, did not know who it was made by.

As to the cigarettes, I know them to be a product of P. Lorillard Co., and not of the Beech-Nut Packing Company. I buy my supplies through the jobbers and handle various brands of their cigarettes and tobacco products,

such as the Murads and Moguls, and, in fact, all the well known brands of cigarettes on the market today.

I never told any customers that the cigarettes or tobacco were made by the Beech-Nut Packing Company and never sold the same as a product of the Beech-Nut Packing Company.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity. No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,	}	
<i>Defendant.</i>		

CERTIFICATE.

*State of Connecticut, County of New Haven, ss.*

I, Herbert J. Krause, a Notary Public, within and for the State of Connecticut, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of John A. Peters, James J. Cashman, Jr., Robert G. Greene, Nathan Hammerman, James J. Marrian, T. J. Branigan, Adam Sattig, Sanford Hawkins, Alexander C. Gardner, Newton Harrison, John F. Griffin, Joseph De Rago, Harry W. Avery, E. Irving Ray, were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me, at New Haven, West Haven, Milford and Hartford, Connecticut, beginning August 29, 1921; that each of the foregoing witnesses was by me duly sworn; that the testimony of said witnesses was taken down in short-hand by me and thereafter reduced to typewriting by me; that the opposing party hereto was represented by Richard B. Cava-

nagh during the taking of said testimony; that the testimony was taken in New Haven, West Haven, Milford and Hartford, beginning at 12 o'clock noon, August 29, 1921; and ending at 2 o'clock in the afternoon, September 1, 1921; that the said deposition of each witness was read by said witness before signing the same, except where the signature of a witness was waived, as indicated on the deposition, and except for the depositions which were stipulated as appears in the record.

I am not connected by blood or marriage with either of the parties hereto, or interested either directly or indirectly in the matter in controversy.

I also certify that I have been paid my fees as Special Examiner and for copies taken in accordance with the attached bill, amounting to \$139.69.

In witness whereof, I have hereunto set my hand and official seal, this 25th day of October, 1921.

HERBERT J. KRAUSE,

[SEAL.]

Notary Public.

My commission expires February 1st, 1926.

*State of Connecticut, County of New Haven, ss.*

I, Alfred N. Wheeler, Clerk of the County of New Haven, and Clerk of the Superior Court in and for said county, do hereby certify that the said court is a court of record. That Herbert J. Krause, Esquire, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument, was at the time of taking the same a Notary Public in and for said county, residing in the County of New Haven, duly commissioned and sworn, and qualified to act as such; that as such Notary Public he was at the time of taking such acknowledgment duly authorized by the laws of the State of Con-

necticut to take the acknowledgments and proofs of deeds or conveyances for lands, tenements or hereditaments in said State of Connecticut; that I am well acquainted with the handwriting of said Herbert J. Krause, Esquire, and verily believe his signature to said certificate or proof of acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at New Haven, in said County of New Haven, State of Connecticut, this 25th day of October, A. D. 1921.

ALFRED N. WHEELER,  
Clerk.

[SEAL.]



UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company }  
vs. } In Equity. No. 3056.  
P. Lorillard Company.

Depositions taken on behalf of plaintiff pursuant to notice and by agreement of counsel, before Louis M. Altman, a Notary Public for the State of Connecticut, acting as Special Examiner by consent of counsel, on September 8, 1921, at Stamford, South Norwalk and Bridgeport, Connecticut.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, for plaintiff; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, for defendant.

JOHN MORELLI, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. John Morelli; 50; 22 Union street, South Norwalk, Connecticut; fruit business.

Q. 2. Your fruit store is located at?

A. 81 North Main street, South Norwalk.

Q. 3. You handle tobacco products?

A. Yes, I do.

Q. 4. I show you a package of Beech-Nut cigarettes and Beech-Nut scrap tobacco, which are in this case as Plaintiff's Exhibits Nos. 1 and 3. Have you handled these products?

A. Yes, I do.

Q. 5. Do you ever hear customers come into the store and make remarks about these products?

A. They come in and say, "What is that Beech-Nut scrap tobacco?" and I say, "Yes," and they say, "Who puts that up, the Beech-Nut Company?" I say, "No. No, it is either the American Tobacco Company or the Lorillard Company," and then they'd say, "Oh, I thought it was the Beech-Nut Company."

Q. 6. How many times has this happened?

A. Oh, quite a few times. At first no one knew nothing about it. Now they don't ask so much; they know it isn't the Beech-Nut Company.

Q. 7. That is, the ones you have talked to?

A. Yes.

Q. 8. You have, then, told people that this scrap tobacco isn't put out by the Beech-Nut Company?

A. Oh, yes; I do.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 9. The Lorillard Company's name is on this cigarette package, isn't it?

A. I never knew it was put up by Lorillard.

X-Q. 10. That is, the name of the tobacco company?

A. Yes.

X-Q. 11. On the scrap tobacco it is also Lorillard on the package?

A. Yes, I see.

X-Q. 12. You always tell the customers that it isn't put out by the Beech-Nut Company?

A. Yes, I do.

X-Q. 13. But that it is put out by the tobacco company?

A. I always tell them it is a P. Lorillard or American Tobacco Company tobacco.

X-Q. 14. And you would not sell a customer tobacco or cigarettes like these Beech-Nut cigarettes or the Beech-Nut scrap tobacco of the Lorillard Company if he wanted

chewing gum or the food products of the Beech-Nut Company?

A. No, I wouldn't.

X-Q. 15. You would not consider them the same class of goods?

A. No, I guess not.

X-Q. 16. You never knew of the Beech-Nut Packing Company ever putting out any tobacco products?

A. No.

Signature waived.

Deposition closed.

GEORGE F. MOULTON, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. George F. Moulton; retail druggist; 43 Washington street, South Norwalk, Connecticut; 55 years.

Q. 2. Do you handle tobacco products in this store?

A. Cigars and cigarettes.

Q. 3. I show you a package of Beech-Nut cigarettes, which is in this case as Plaintiff's Exhibit No. 1. Have you handled these here?

A. Yes.

Q. 4. How long have you handled them?

A. Several months.

Q. 5. Whose product did you think these cigarettes were prior to yesterday?

A. Beech-Nut people, of course.

Q. 6. Do you now think they are a Beech-Nut product?

A. From what you told me, no.

Q. 7. When did I tell you that they were not?

A. Yesterday.

Q. 8. Have you yourself sold these cigarettes over the counter?

A. I have, yes.

Q. 9. I show you a package of scrap tobacco, which is in this case as Plaintiff's Exhibit No. 3. Whose product would you take that to be?

A. Beech-Nut, of course.

Q. 10. What do you mean by Beech-Nut?

A. Made by the Beech-Nut Packing Company.

Q. 11. Why would you take that to be a Beech-Nut product?

A. From the name and label on it and the trade-mark.

Q. 12. Have you ever seen this scrap tobacco before today?

A. No.

Q. 13. Have you ever seen it displayed around anywhere in this town or elsewhere?

A. No, I have not.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 14. From whom do you buy these Beech-Nut cigarettes?

A. Jobbers.

X-Q. 15. Ever hear of the P. Lorillard Company?

A. Yes, tobaccoists.

X-Q. 16. You notice P. Lorillard Company's name on the package?

A. I do now, yes.

X-Q. 17. You notice the name Lorillard on the scrap tobacco?

A. I do now, yes.

X-Q. 18. So when you first saw that package, or when you handled them first, you didn't pay any attention to the name, just glanced at the package?

A. Well, Beech-Nut was the prominent name.

X-Q. 19. If you had seen Lorillard's name on them you would have known it was the product of the tobacco company, wouldn't you?

A. Yes.

X-Q. 20. Do you sell Beech-Nut products here—chewing gum and the like?

A. Yes, indeed.

X-Q. 21. If you went into a store you wouldn't be confused or deceived into taking Beech-Nut mints or Beech-Nut chewing gum for or in place of Beech-Nut cigarettes or scrap tobacco?

A. Not in place of them, no.

X-Q. 22. You would consider them a different class of goods, made by some company only foreign to the other, so far as the class of goods goes?

A. Yes.

Signature waived.

Deposition closed.

#### STIPULATION.

It is stipulated by and between the parties hereto, through their respective counsel, that if TRACY N. COLLINS were called he would testify as follows:

My name is Tracy N. Collins; I am of legal age, and the proprietor of a grocery and general store, and restaurant located in Noroton, Conn. I have stocked and sold Beech-Nut scrap tobacco similar to Plaintiff's Exhibit No. 3 for about two years, and I have stocked and sold Beech-Nut cigarettes similar to Plaintiff's Exhibit No. 1 since these cigarettes came out in this territory, which was in the spring of 1921. I always believed that both the scrap tobacco and the cigarettes were made by the Beech-Nut Packing Company, the same people who

make the chewing gum and other food products, until I was told by Mr. Hinton, on September 7, 1921, that the Beech-Nut Packing Company did not make either of these two products.

On cross-examination witness would testify as follows:

I bought the Beech-Nut scrap tobacco and the Beech-Nut cigarettes from jobbers, and am still buying and selling these products. I never noticed the name Lorillard or P. Lorillard Company on the packages, as I did not take the trouble to look at them, and as I now see from looking at the package that the name Lorillard's appears on the scrap tobacco and P. Lorillard Company on the cigarette package, and from this I would understand these to be a product of P. Lorillard Company, the tobacco manufacturers. I would not be confused or deceived into selling this scrap tobacco or the cigarettes in the place or instead of the chewing gum, or any of the Beech-Nut food products of the Beech-Nut Packing Company, nor would I be myself deceived into accepting gum or food products in the place of a tobacco product, and *vice-versa*.

WILLIAM P. MELIA, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is William P. Melia; your age is 32; your residence is 305 Laurel avenue, Bridgeport, Connecticut, and you are a salesman for the Beech-Nut Packing Company; is this correct?

A. Yes.

Q. 2. How long have you been employed by the Beech-Nut Packing Company, and what territories do you cover?

A. Two years I have been with the Beech-Nut Company, covering the territory from Greenwich back to Danbury.

Q. 3. What counties would this be?

A. Fairfield County.

Q. 4. Connecticut?

A. Yes.

Q. 5. I show you a package of cigarettes, which is in this case as Plaintiff's Exhibit No. 1, being a package of Beech-Nut cigarettes. When did these cigarettes come out in this territory?

A. In this territory? I should judge about six months ago.

Q. 6. Have you since that time seen these cigarettes displayed in store windows and advertised by posters and the like?

A. Yes, sir, I have.

Q. 7. Do you drive a car in your work?

A. I drive a Beech-Nut car—a car with the Beech-Nut label on the side.

Q. 8. Have you heard comments or remarks from the people you have encountered in your work since these cigarettes came out, about these cigarettes?

A. About these cigarettes? Yes, sir.

Q. 9. Please state the nature of comments, inquiries and remarks which you have heard.

A. Some would say, "Say, how long have you been making cigarettes?" Other people would ask for samples, and would say, "When did you start to make cigarettes?" Others would say, "Well, I hope these will be as good as the gum."

Q. 10. I wish you would give me a strictly conservative estimate of the number of remarks of this general character which you have heard since these cigarettes came out.

A. What do you mean "Since these cigarettes came out?"—about the total number I have heard as I have gone over my territory?

Q. 11. Yes, in so far as you can estimate it.

A. I should say a thousand times easy.

Q. 12. How many would you get in a day?

A. Well, that would all depend on the trade you were calling on. If you are calling on delicatessen trade and fruit stores, you would probably get about thirty-five or forty; if you call on hotels and drug stores you would get an average of a hundred. That would be taking in the people in the rear who are as a rule always looking for samples from a man when he enters the place, regardless of the line he carries.

Q. 13. And these people would ask you for samples; is that what you mean?

A. Yes.

Q. 14. Of what?

A. Beech-Nut cigarettes.

Q. 15. Have you seen the Beech-Nut scrap tobacco similar to Plaintiff's Exhibit No. 3 displayed at all in this territory?

A. I have some, yes.

Q. 16. To what extent have you seen it displayed in comparison with the cigarettes?

A. Well, not as much, for I don't see very much of it.

Q. 17. Will you give me an illustrative instance of some particular instance that you can remember, if you can, of people who asked you for cigarette samples?

A. Well, for instance, I go to the Elks' Club quite a lot, and we go down to bowl. And since these cigarettes first came out, they say, "Why don't you bring us around some samples of your cigarettes?" I have had instances on the road, too; I had one only on my last trip up to Reading. I was in a store demonstrating candy goods,



and I had a few samples of Beech-Nut gum in my pocket. Two ladies drove up in a car, as apparently all in that section are very wealthy people. Two girls got out, and after I had given them samples of the gum they walked out to the car, but came back and asked in a whisper for a few samples of Beech-Nut cigarettes.

Q. 18. How long ago was this, Mr. Melia?

A. This was a month ago.

Q. 19. Did you get the names of those two girls?

A. No, I did not; but the lady who owned the store knows they asked for the cigarettes.

(Last portion of witness' answer objected to as hearsay.)

*Cross-Examination by Mr. Cavanagh.*

X-Q. 20. What products do you sell for the Beech-Nut Company in this territory?

A. Full line.

X-Q. 21. That includes food products?

A. That includes food products, chewing gum, mints—confectionery line right straight through.

X-Q. 22. And also ginger ale?

A. Ginger ale, yes, sir.

X-Q. 23. Do you handle any tobacco products for the Beech-Nut Packing Company?

A. No, sir.

X-Q. 24. Do you ever sell any tobacco products for the Beech-Nut Packing Company?

A. No, sir.

X-Q. 25. You never knew the Beech-Nut Packing Company ever put out cigarettes or scrap tobacco or chewing tobacco, did you?

A. No, sir.

X-Q. 26. You never sold for the Beech-Nut Packing Company any product which was packed or made up in a cigarette package like this?

A. No, sir.

X-Q. 27. Likewise you never sold any tobacco for the Beech-Nut Packing Company put up in a package like the Lorillard scrap tobacco, did you?

A. No, sir.

X-Q. 28. You say that there are hundreds and perhaps about a thousand people who have asked you if the Beech-Nut Packing Company was putting these out?

A. Yes, sir.

X-Q. 29. Did you keep track of this number?

A. No, sir; I used to make a record of the cigarette inquiries when they first came out and a fellow on Water street was handling them.

X-Q. 30. So you have kept track of the number of people who have asked you?

A. No, I haven't. Just as I told you, when they started to come out from my own observations, I used to keep a little record for my own information, as about fifty or sixty people would ask me right along.

X-Q. 31. And they asked you if the Beech-Nut Packing Company was putting out cigarettes?

A. How long they had been.

X-Q. 32. I understand that the Beech-Nut Packing Company has put out a new food product every now and then?

A. Yes, sir.

X-Q. 33. Well, you haven't had an average of fifty or sixty people a day asking how long they have been putting these out?

A. No, if you are a good, live salesman you are supposed to tell them and show them samples.

X-Q. 34. You never had all these thousand inquiries from this territory of yours in Connecticut with Beech-Nut ginger ale when it was first put out, did you?

A. No, sir; but I would not say that I wouldn't have the inquiries.

X-Q. 35. And if you were down in the basement of this club in the bowling alleys that you speak of, you didn't have all your friends asking for ginger ale samples?

A. Off and on I have had people asking for ginger ale samples.

X-Q. 36. But not to the same extent as the cigarettes?

A. No, I didn't have any cigarettes to give out.

X-Q. 37. But you didn't go down into the bowling alley of your club, for instance, and generally hand out samples of ginger ale?

A. I didn't give a sample of ginger ale down in the club.

X-Q. 38. Not in bottles and not to individuals?

A. No; I talked to the manager and handed him a sample.

X-Q. 39. But you didn't make a practice of giving away your products in samples to individual members at the club?

A. No, sir.

X-Q. 40. Isn't it a fact from your experience as a club member, that the men or fellows at the club will take an interest in a thing like a cigarette where they wouldn't in food products or ginger ale; that is, they would want samples of cigarettes when they wouldn't want them of the other?

A. Yes, sir.

X-Q. 41. You would naturally attribute that to the fact that men are universally the same and would want cigarettes where they wouldn't want to bother about ginger ale?

A. Well, if I stopped in at the bowling alley usually they would say, "Give me a sample of Beech-Nut gum." and I have continuously given out samples there and built up a nice business, and never go in without leaving samples of gum.

X-Q. 42. And you have found that the men would also then turn around and ask for samples of the Beech-Nut cigarettes?

A. Yes, sir.

X-Q. 43. Did you ever take the trouble to look at that package?

A. Yes, sir.

X-Q. 44. You saw the name P. Lorillard Company on it, didn't you?

A. Yes, sir.

X-Q. 45. You know who the Lorillard Company is?

A. Yes, sir.

X-Q. 46. And when you examined the package of scrap tobacco you saw the name Lorillard on that, didn't you?

A. No, sir. I didn't look at the scrap tobacco; didn't bother with it.

X-Q. 47. When these people asked you for samples of Beech-Nut cigarettes, that is, the various people you met in your business (I am requiring you to say no particular ones, but just in your traveling generally)—what did you tell them?

A. I told them we never made cigarettes.

X-Q. 48. Told them that they were made by Lorillard Company, didn't you?

A. Yes, sir.

X-Q. 49. Beech-Nut?

A. Well, they would say, for instance, if it is in a store, a man handling thousands of packages never knew they were Lorillard's product, but was under the impression also that they were Beech-Nut.

X-Q. 50. What man handling thousands of packages do you mean?

A. What man?

X-Q. 51. Yes.

A. An Italian fellow in Stamford who had a fruit stand.

X-Q. 52. Do you know if he sold thousands of packages of them?

A. I never saw him buy less than eight or nine cartons.

X-Q. 53. You don't know whether he ever looked to see if Lorillard's name was on the package?

A. That I can't say.

X-Q. 54. You don't know what gave him this impression?

A. No, sir; I have been going there off and on to sell my line to Abrams, back of the Hotel Davenport. He used to handle them right along, and brought a package out one day, and said, "I am handling all the Beech-Nut products," and I said, "That is not ours."

X-Q. 55. You don't know anything yourself about why he might have thought they were Beech-Nut?

A. No, I don't know anything about it.

X-Q. 56. You never told any people that the Beech-Nut Packing Company was putting out these cigarettes, did you?

A. No, sir.

X-Q. 57. And you have never yourself tried to sell this product or taken orders for these Beech-Nut cigarettes on behalf of the Beech-Nut Packing Company, have you?

A. No, sir.

X-Q. 58. If you went into a store and wanted to buy some Beech-Nut chewing gum or other Beech-Nut food product, you wouldn't be confused or deceived into accepting Beech-Nut scrap tobacco or the Beech-Nut cigarettes in place of the chewing gum or other food product, would you?

A. No, sir.

X-Q. 59. You would consider them different classes of goods, wouldn't you?

A. Yes, sir, entirely.

X-Q. 60. You say your whole territory covers Fairfield County?

A. Yes.

X-Q. 61. You sell in Stamford?

A. Yes, sir; Greenwich, South Beach, Stamford, Darien, Noroton, Norwalk, Southport, Westport, Bridgeport, Fairfield.

X-Q. 62. You don't sell to the United Cigar Stores up here or to Schultes?

A. No, sir.

Signature waived.

Deposition closed.

#### STIPULATION.

It is stipulated by and between the parties hereto, through their respective counsel, that if EDWARD ABRAMS were called in he would testify as follows:

My name is Edward Abrams; I am of legal age, and am proprietor of a news and tobacco-stand in the Davenport Hotel, Stamford, Connecticut, and of a cigar store at 33 Bank street, Stamford, Connecticut. I work in both places and sell goods therein. I have sold the Beech-Nut cigarettes similar to Plaintiff's Exhibit No. 1, since they came on the market in this territory, and always believed them to be the product of the Beech-Nut Packing Company until I was told, about September 5, 1921, by Mr. Atkinson, a representative of the Beech-Nut Packing Company, that this company had nothing to do with this product. I had never before seen a package of Plaintiff's Exhibit No. 3, Beech-Nut Scrap Tobacco, until I was shown one the other day.

On cross-examination the witness would testify that he never examined a package of cigarettes and never paid any attention to the same, as he buys his goods from jobbers, and not direct from the manufacturers; that if he had seen the name P. Lorillard Company on the package, he would have known that it was a product of P. Lorillard Company, tobacco manufacturers, as he knows that the P. Lorillard Company is a large tobacco manufacturing concern; that he is still buying and selling the cigarettes, and that if a customer came into his store and wanted to purchase Beech-Nut chewing gum, which he handles, he would not sell him, and has never sold any customer, Beech-Nut cigarettes for and in place and instead of Beech-Nut chewing gum, and that he himself could not be confused or deceived into accepting Beech-Nut cigarettes, or Beech-Nut scrap tobacco, for and in place of the Beech-Nut chewing gum; and *vice-versa*.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Co.,	} In Equity. No. 3056.
vs.	
P. Lorillard Company.	

CERTIFICATE.

*State of Connecticut, County of Fairfield, ss. Stamford.*

I, Louis M. Altman, a Notary Public in and for the State of Connecticut, acting as Special Examiner, by consent of counsel, hereby certify that the foregoing depositions of John Morelli, George F. Moulton, Tracy N. Collins, William P. Melia and Edward Abrams, were taken in behalf of the Beech-Nut Packing Company, pursuant to agreement by and before me, beginning on September 8, 1921, at Stamford, Connecticut, and ending the

same day; that the depositions were taken at Stamford, Connecticut, South Norwalk, Connecticut, and Bridgeport, Connecticut; that the opposing party was represented by counsel during the taking of the testimony; that the depositions were taken stenographically and transcribed under my supervision by Helen E. Woods, a public stenographer well known to me; that I am not related by blood or marriage to either of the parties to this cause and have no interest therein.

I further certify that I have been paid \$35.41 as fees for attendance and taking of the depositions, and that the same is a fair, just and reasonable fee.

In witness whereof I have hereunto set my hand and official seal this 27th day of September, 1921.

LOUIS M. ALTMAN.

[SEAL.]



IN THE UNITED STATES DISTRICT COURT, DISTRICT OF  
NEW JERSEY.

Beech-Nut Packing Company, <i>Plaintiff,</i>	} In Equity. No. 3056.
<i>vs.</i>	
P. Lorillard Company, <i>Defendant.</i>	

Depositions taken on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before S. E. Harvey, a Notary Public within and for the County of Cook and State of Illinois, acting as Special Examiner by consent of counsel, at the office of Offield, Poole, Hinton & Scott, 1737 First National Bank Building, Chicago, Illinois, beginning the thirty-first day of October at one o'clock P. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, attorneys for the Beech-Nut Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, attorneys for P. Lorillard Company.

ROY B. SOUTHERN, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is Roy B. Southern, your age is 38, your residence is 4641 Lake Park Avenue, Chicago, you are a salesman for the Beech-Nut Packing Company and have been employed by the Beech-Nut Packing Company since December, 1920?

A. Yes.

Q. 2. What territory do you cover, Mr. Southern?

A. From 75th Street, south, including Will County, Illinois.

Q. 3. I show you a package of Beech-Nut scrap tobacco, being Plaintiff's Exhibit No. 3, in this case. Have you seen this tobacco displayed since you have been working for the Beech-Nut Packing Company?

A. Yes, sir.

Q. 4. As you have been going about your work, have you ever heard comments, remarks or inquiries about this scrap tobacco? If so, what has been their character?

A. Well, "Have you people been making Beech-Nut tobacco?" "How long have you been making Beech-Nut tobacco?" "I didn't know you had been making Beech-Nut tobacco." "Have you a sample of Beech-Nut tobacco?"

Q. 5. From whom have you heard these comments, remarks and inquiries? I mean from what class of people.

A. Grocerymen and working people. Paving crews.

Q. 6. How frequently have you heard such comments, remarks and inquiries?

A. Numerous remarks. Several daily.

Q. 7. Can you give me any particular instances where you have heard such comments, remarks, and inquiries? I want only the instances where you can state definitely where the instance occurred and have a very definite recollection of what was said, and who said it.

A. Some that I can call to memory—Paul Meyers of Madison, Illinois, groceryman. When I called on him he said. "Hello, Beech-Nut. Give me two cartons of scrap tobacco. That's all I want this trip." I informed him we did not make the scrap tobacco, but was unable to convince him. He said if some other company was making Beech-Nut tobacco he would make Beech-

Nut sausage. Another case: C. B. Johnson in Joliet. When I called on him he said, "Hello, Beech-Nut, give me some tobacco and cigarettes. I have been waiting for you to give you an order." Called on a man in Palos Park. After I left the store there was a paving crew working just below. They stopped me and wanted some samples of scrap tobacco and asked me why I didn't keep this groceryman supplied.

Q. 8. Were you driving an automobile at the time?

A. Yes, sir.

Q. 9. What, if anything, was on the automobile?

A. Beech-Nut Pure Food Products.

Q. 10. Was this automobile where the paving crew could see it?

A. Yes, sir.

Q. 11. Well, give me some more instances, if you can remember them.

A. Along in January, I believe it was, or February, I stopped in an ex-saloon in Lemont, near beer account, to sell them some ginger ale. Was passing my samples. He says, "I can't use that, but I can use two or three cartons scrap tobacco if you have them with you." Numerous others. I don't recall right now. But there were several others.

Q. 12. I now show you a package of Beech-Nut cigarettes, being Plaintiff's Exhibit No. 1, in this case. Will you please state how long, to your knowledge, these cigarettes have been displayed in the territory that you cover?

A. I first noticed them about two months before to-day.

Q. 13. Will you please state briefly what your experience has been in connection with the Beech-Nut cigarettes?

A. I have numerous inquiries, asking if they were

made by us, and why I don't tell them I handle cigarettes and give them some samples. "How long have you been making them," and so on.

Q. 14. How many times would you say that has happened? I want a conservative estimate.

A. I should judge ten or fifteen times a day.

Q. 15. Can you give me any particular instances of such comments, remarks and inquiries concerning the Beech-Nut cigarettes?

A. Well, Mr. Zwyers, the butcher at Thompkins & Son—I called in his place—asked me why I hadn't told him we were making cigarettes and give him some samples. Said he told cigarette salesman when he called he would get all the samples of cigarettes he wanted when I called. Another case. Called on Charles Larson in Roseland, 113 and Vincennes. He said, "Hello, Beech-Nut. You are the very fellow I wanted to see. If you people are making cigarettes I want to cancel that ten case drop shipment I have on the road." Another case, I believe, that I recall in Blue Island. His name is Sck——. Called on him last week. Asked him how the Beech-Nut line was going. He said he was selling lots of gum and tobacco, but the cigarettes weren't moving so fast, although he told his trade they were good, because they were all three made by the same company. I believe that is about all I recall right now that I can give names of. Several others. Mr. Stube in Blue Island is another. I was talking to one of his grocery salesmen about Beech-Nut cigarettes and Mr. Stube came up and I saw fit to inform him that we didn't make them. Seemed very much surprised to think that they were not a product of Beech-Nut Packing Company. I believe that is all I can recall right now.

Q. 16. Have there been other instances of this character in connection with cigarettes and scrap tobacco,

besides those which you have specifically enumerated?

A. Yes. I have inquiries every day. I believe that's all that I know names and addresses of.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. I understand that you have been with the Beech-Nut Packing Company since about December, 1920?

A. Yes, sir.

X-Q. 2. As a salesman?

A. I have.

X-Q. 3. You visit the trade, don't you?

A. Grocery trade. Yes, sir.

X-Q. 4. Approximately, how many stores do you visit in your territory?

A. A day?

X-Q. 5. No. Just total approximately.

A. Four hundred.

X-Q. 6. And how many do you visit a day?

A. From fifteen to twenty-five.

X-Q. 7. How long have you known of that Beech-Nut scrap tobacco, Plaintiff's Exhibit 3, to be on the market?

A. I guess two years.

X-Q. 8. So you knew it was on the market before you entered the employ of Beech-Nut Packing Company?

A. I had just seen it.

X-Q. 9. Do you smoke?

A. Yes, sir.

X-Q. 10. Do you chew?

A. No, sir.

X-Q. 11. Did you ever smoke any Beech-Nut cigarettes?

A. One.

X-Q. 12. Did you ever buy a package of them?

A. No, sir.

X-Q. 13. You note the name Lorillard on that scrap tobacco package?

A. The fact someone showed it to me. I believe Mr. Vosburg showed it to me. I don't recall who showed it to me.

X-Q. 14. Never bought a package?

A. No, sir.

X-Q. 15. So you had no occasion to look at it all during those two years?

A. No, sir.

X-Q. 16. Will you describe the sign you say is on your automobile?

A. Beech-Nut (in oval) Pure Food Products.

X-Q. 17. That oval is a red band, is it not?

A. No; it was gold.

X-Q. 18. In order to save time, I show you one of the labels of the Beech-Nut Packing Company. Does the sign on your wagon resemble that in general?

A. On the back and each door. Not on the sides.

X-Q. 19. What is on the door?

A. On each door and on the back, this label.

X-Q. 20. So substantially that label does appear on your automobile?

A. Yes, but not on the sides.

X-Q. 21. And on the sides you have the words Beech-Nut Food Products. Now, just what do you sell for the Beech-Nut Packing Company?

A. I sell gum, candy, peanut butter, beans, catsup, chili sauce, mustard, alimentary paste products.

X-Q. 22. Did you ever sell any tobacco products?

A. No, sir.

X-Q. 23. Did you ever know the Beech-Nut Packing Company to sell any tobacco products?

A. No.

X-Q. 24. Did you ever know the Beech-Nut Packing Company to sell any product that was packaged exactly like the scrap tobacco?

A. No.

X-Q. 25. Likewise, did you every know the Beech-Nut Packing Company to sell any goods packaged like packages of cigarettes?

A. No.

X-Q. 26. Is it your practice when you call on the trade to give them samples of your various products?

A. Every time I call.

X-Q. 27. You give away samples to the grocers and trade in general?

A. Yes, sir. To the trade in general.

X-Q. 28. And do you give samples away to people on the streets that ask for them?

A. Everybody we meet, if it is convenient, we can.

X-Q. 29. Where was it you said this paving crew was?

A. Palos Park, Illinois.

X-Q. 30. Had you ever given that crew any samples before?

A. No, sir.

X-Q. 31. How long does it take you to get around through your trade, to cover the territory of your four or five hundred customers?

A. Four or five weeks.

X-Q. 32. And when these customers ask you about Beech-Nut tobacco, do you tell who it was made by?

A. Not as a rule. Just told them we didn't make tobacco and cigarettes.

X-Q. 33. Never had any more conversation about it? Simply told them you did not make it?

A. Yes.

X-Q. 34. Is that the way the incident happens? They look and see who does make it?

A. Yes, sir.

X-Q. 35. Did you ever see a carton of Beech-Nut scrap tobacco?

A. Yes.

X-Q. 36. How large is it?

A. I should judge 8 wide, 14 the other and probably 18 the other.

X-Q. 37. Do you know the names of any of the men on that paving crew?

A. I do not.

X-Q. 38. You haven't seen that crew since that time?

A. No, sir.

X-Q. 39. As one who smokes, could you be confused into buying a package of those Beech-Nut cigarettes for a food product or for chewing gum?

A. I might by the name. If I was used to chewing chewing gum.

X-Q. 40. Then you consider tobacco to be the same as food?

A. Gum is not food.

X-Q. 41. Do you consider tobacco the same as chewing gum?

A. I consider the habit the same as chewing gum.

X-Q. 42. You don't know the difference between chewing gum and tobacco?

A. Oh, sure!

X-Q. 43. Then if you wanted some tobacco and a man handed you a package of chewing gum, you would take it for tobacco?

A. If I wanted some chewing tobacco and I chewed Beech-Nut gum, I might buy Beech-Nut tobacco, thinking it was good like the gum.

X-Q. 44. I am not asking you what you would think it was good like; would you take the tobacco for the gum?



A. No.

X-Q. 45. Different kinds of goods, are they?

A. Yes. Tobacco is tobacco and gum is gum.

X-Q. 46. What was the name of that party you mentioned in Madison?

A. Paul Meyers.

X-Q. 47. And the man in Joliet was Johnson?

A. C. V. Johnson, 500 College Street.

X-Q. 48. Then there was another man named Zwyers?

A. Yes, sir.

X-Q. 49. Then, those people say, "Hello, Beech-Nut"?

A. Every time I enter store, that is first thing they say.

X-Q. 50. They don't call you by your own name?

A. No. Rarely ever.

*Re-Direct Examination by Mr. Hinton.*

R-D. Q. 1. Who is Mr. Vosburg?

A. Division manager for the Beech-Nut Packing Company.

ALBERT B. LEWIS, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is Albert B. Lewis, your age is 46, your residence is 510 W. 72nd Street, Chicago, you are a salesman for the Beech-Nut Packing Company. Is that correct?

A. Yes.

Q. 2. How long have you been employed as salesman by the Beech-Nut Packing Company and in what territory?

A. Fourteen years. At the present from the loop to 75th Street, in Chicago, Illinois.

Q. 3. I show you package of scrap tobacco, being Beech-Nut Scrap Tobacco, Plaintiff's Exhibit No. 3. Have you seen this tobacco displayed in your territory? If so, how long?

A. About four or five years.

Q. 4. Have you, as you were going about your work, heard comments, remarks and inquiries about this scrap tobacco? If so, in about what numbers?

A. I have heard any number. Say several hundred times during that time.

Q. 5. From whom?

A. From retailers that I call on, such as grocers, druggists, confectioners, tobacco dealers, and a number of inquiries from personal acquaintances that are not retailers.

Q. 6. Will you please give me an illustration of the kind of comments, remarks and inquiries you have heard? What they would say to you?

A. In entering a store I am generally greeted, "Hello, Beech-Nut! I see you are putting out Beech-Nut tobacco." "How long have you been putting out tobacco?" It is the general impression that Beech-Nut tobacco is a Beech-Nut product of the Beech-Nut Packing Company.

Q. 7. I wish you would give me an illustrative definite instance of this character.

A. One recently. In calling on a Mr. Ballard I was asked by him, "I see you are putting out Beech-Nut tobacco and cigarettes." Mr. Christiansen, who works for him, says, "Yes, I saw the tobacco and cigarettes at the cigar store." To convince them that they were not a Beech-Nut product, I bought a package of cigarettes at the United Cigar Store right near them. In

making the purchase I asked the clerk if Beech-Nut cigarettes were as good as the Beech-Nut gum they were putting out. He said, "Just as good."

Q. 8. Where was this cigar store?

A. 1528 E. 53rd Street.

Q. 9. What is its name?

A. United Cigar Store.

Q. 10. What streets is it on?

A. 53rd.

Q. 11. Is it on the corner?

A. No. 1528. Near corner of Lake Park Ave.

Q. 12. Do you know what building it is in?

A. Holland Hotel.

Q. 13. Now, have you heard comments, remarks and inquiries about the Beech-Nut Cigarettes, Plaintiff's Exhibit No. 1, a package of which I show you?

A. I have had more inquiries about the cigarettes than I have had about tobacco. They are more widely displayed and more advertised. Practically same inquiries as were made, only more so.

Q. 14. You have said in your testimony that your customers have greeted you, "Hello, Beech-Nut!" To what extent do they greet you that way?

A. Practically all of them. Very seldom I find a man that will ever call me by my name. Sometimes it is a personal friend and he will call me by my name. Not one out of twenty-five will call me by my name.

Q. 15. Approximately, how many stores do you call on, Mr. Lewis?

A. Why, there would be at least one thousand.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. As I understand you, Mr. Lewis, you have been a salesman for the Beech-Nut Packing Company for about fourteen years?

A. Yes, sir.

X-Q. 2. What line of their products do you sell?

A. Everything that they put out.

X-Q. 3. Did you ever sell any tobacco products for the Beech-Nut Packing Company?

A. No.

X-Q. 4. No cigarettes nor scrap tobacco?

A. No.

X-Q. 5. When you visit a store, one of your customers,—he gives you an order for whatever Beech-Nut products he wants?

A. Yes. The goods I try to sell him.

X-Q. 6. What I mean is he gives you his entire order for any Beech-Nut stuff. He doesn't buy through any jobbers?

A. He does. We do our business through jobbers.

X-Q. 7. Why do you visit the store?

A. We take the orders through the jobbers.

X-Q. 8. I do not quite follow you. Would you just detail for me the procedure that you follow from getting an order from a man until the goods is delivered to him?

A. We call on retailer, whatever line of business it is. We take his order, sell him what he can use in our line, ask him what jobber he wishes that delivered through. Then that order is turned over to the jobber.

X-Q. 9. Then, as I understand it, you, a salesman for the Beech-Nut Packing Company, will take the order personally and direct and then deliver the goods through the jobber?

A. The jobber delivers the goods.

X-Q. 10. You come into personal contact with customers?

A. Yes.

X-Q. 11. You never sold any of these customers tobacco?

A. No.

X-Q. 12. You never took an order from any of them for tobacco?

A. No.

X-Q. 13. You never told any of the customers that this Beech-Nut scrap tobacco or Beech-Nut cigarettes were made by Beech-Nut Packing Company?

A. Absolutely not. Told them that it was not.

X-Q. 14. Who did you tell them it was made by?

A. I have shown them it was made by P. Lorillard.

X-Q. 15. All of the Beech-Nut Packing Company products which you sell, so far as you know, bear the name of the Beech-Nut Packing Company on them?

A. In some way, some place on them.

X-Q. 16. I understood you to say that you handled all Beech-Nut products. Under what other trade-marks or trade names other than that shown by Beech-Nut red band label like this Beech-Nut bacon label which is marked for identification, Defendant's Cross Exhibit 8, are some of the Beech-Nut goods sold? I will make myself a little clearer. Do you sell Mohawk goods for the Beech-Nut Packing Company?

A. The Mohawk Brand, you mean. They have it, but we never sell that in Chicago territory. It is listed on our price list.

X-Q. 17. The same as to the Erie Brand for the Beech-Nut Packing Company. The Erie Brand. This also appears on your price list?

A. Yes, sir.

X-Q. 18. You never sold or took orders for any goods of the Beech-Nut Packing Company that were put up in a package like that tobacco scrap package, did you?

A. No.

X-Q. 19. And you never sold any of their goods in a package that looks like the cigarette package?

A. No.

X-Q. 20. The cigarette package has a sort of individuality of its own?

A. Looks like a cigarette package.

X-Q. 21. If you went into a store and you wanted some chewing gum, could you be confused and deceived into taking scrap tobacco or cigarettes in place of chewing gum?

A. No.

X-Q. 22. Because it is entirely different goods?

A. If I went in for chewing gum, they couldn't give me chewing tobacco for chewing gum.

X-Q. 23. Likewise, you wouldn't take chewing gum if you wanted chewing tobacco or cigarettes?

A. Absolutely not.

X-Q. 24. You regard them as different goods?

A. I do.

Cross-examination closed.

*Re-Direct Examination by Mr. Hinton.*

R-D. Q. 1. Would you say that a Beech-Nut ham had an individuality of its own as regards the appearance of the package?

A. You could tell a ham by its wrapping.

R-D. Q. 2. How about Beech-Nut canned goods? Would you mistake any Beech-Nut canned goods for a Beech-Nut ham?

A. No. I could tell. If a label was the same as a Beech-Nut label I might be confused into thinking that was a Beech-Nut Brand.

*Re-Cross Examination by Mr. Cavanagh.*

R-X Q. 1. Beech-Nut ham and Beech-Nut canned goods are both food products?

A. Yes.

R-X Q. 2. They are eaten and taken into the stomach?

A. Yes.

R-X Q. 3. At the dinner by the kids and the women and the rest of the family?

A. Absolutely.

R-X Q. 4. Never heard of them eating tobacco?

A. They take it in their mouths.

R-X Q. 5. Did you ever hear of them taking it into the stomach?

A. No. No more than gum.

R-X Q. 6. You don't consider gum to be tobacco?

A. No.

Deposition closed.

Signature waived.

ALBERT LEVY, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. At the present time?

Q. 2. Yes, sir.

A. Albert Levy; 55; Oak Park, Illinois; candy jobber.

Q. 3. Where is your place of business?

A. 181 West Lake Street.

Q. 4. Do you carry chewing gum, mints and the like, Mr. Levy?

A. I do.

Q. 5. State if you know whether tobacco jobbers carry these products.

A. Many do.

Q. 6. Will you please state when your attention was first directed to the Beech-Nut scrap tobacco, a package

of which I now show you, being Plaintiff's Exhibit No. 3?

A. Several years ago.

Q. 7. What happened then?

A. My first impression on seeing same was that it was another product of the Beech-Nut Packing Company.

Q. 8. Do you remember what it was that you first saw?

A. A cut out sign covering a large space in the window of a cigar store.

Q. 9. What was on that sign, do you remember?

A. No.

Q. 10. After you saw the cut out sign, did you subsequently see on display in different places package of this scrap tobacco?

A. Which scrap tobacco?

Q. 11. This scrap tobacco we are talking about. (Shows witness Plaintiff's Exhibit No. 3.)

A. Yes.

Q. 12. How long did you continue to believe that the Beech-Nut scrap tobacco was another product put out by the Beech-Nut Packing Company?

A. Until quite recently.

Q. 13. And how were you advised or informed quite recently that this belief was erroneous?

A. By the agent of Beech-Nut Packing Company calling upon me in his regular line of work, who in a general conversation informed me that they did not manufacture nor were they interested.

Q. 14. Had you prior to being definitely informed by the agent of the Beech-Nut Packing Company ever seen the name Lorillard's which appears on the top of this package of scrap tobacco?

A. I did.



Q. 15. Will you please state the circumstances under which you first saw this name "Lorillard's"?

A. Having occasion to purchase some cigars at a cigar store on 47th Street near Vincennes Ave., Chicago, I purchased my cigars and then was about to enter a room in the rear of the cigar store and noticed this package of tobacco on sale in the glass show case. Curiosity prompted me to look at the label. Then noticed the name of Lorillard on the top of same.

Q. 16. If you can remember, I would like to have you say how close about were you to the package when you first noticed the name "Lorillard's" on it?

A. Twelve or fifteen inches.

Q. 17. Do you mean that your eyes were that close to it?

A. Yes.

Q. 18. Now, after you had observed this name "Lorillard's" on the package, what did you then conclude as to the origin or responsibility for this tobacco?

Mr. Cavanagh: Objected to as simply calling for an opinion on the part of the witness.

A. I was under the impression that either Lorillard was making this tobacco for the Beech-Nut people or possibly had some arrangement for the use of the name.

Q. 19. And you were first definitely advised that the Beech-Nut Packing Company had nothing to do with this product, when?

A. In general conversation with their agent, Mr. Vosburgh, some time in October.

Q. 20. I wish you would tell me if you remember approximately how long before this general conversation it was that you had detected the name "Lorillard's" on the package? I don't want anything but an approximation.

A. Several years.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. Mr. Levy, how long have you been in the confectionery business, approximately?

A. Over twenty years.

X-Q. 2. Do you sell any products of the Beech-Nut Packing Company?

A. I do.

X-Q. 3. What do you sell? Name them.

A. Beech-Nut gum, Beech-Nut mints, all flavors, Beech-Nut candy, all flavors, and possibly several other numbers off and on.

X-Q. 4. They all relate to the confectionery business?

A. Yes, sir.

X-Q. 5. Do you buy your goods through an agent of the Beech-Nut Packing Company or do you order direct from firm in Canajoharie?

A. Both.

X-Q. 6. You always get them from or through somebody connected with the Beech-Nut Packing Company?

A. Yes.

X-Q. 7. Do you sell tobacco?

A. No, sir.

X-Q. 8. You do not handle it at all?

A. No, sir.

X-Q. 9. You never ordered any tobacco through any of the Beech-Nut Packing Company people, did you?

A. No, sir.

X-Q. 10. You never heard of Beech-Nut Packing Company selling tobacco?

A. No, sir.

X-Q. 11. Do you use tobacco?

A. Smoke cigars.

X-Q. 12. You don't use cigarettes or you don't chew scrap tobacco?

A. No, sir.

X-Q. 13. Did you ever buy a package of Beech-Nut cigarettes?

A. No, sir.

X-Q. 14. Did you ever buy a package of Beech-Nut scrap tobacco?

A. No, sir.

X-Q. 15. You never had occasion to handle packages of Beech-Nut cigarettes or scrap tobacco—take in your hand and look at them?

A. Once.

X-Q. 16. When was that?

A. Several years ago.

X-Q. 17. Is that the occasion you spoke of when you noticed the name "Lorillard's"?

A. Yes, sir.

X-Q. 18. Did you ever hear of Lorillard Company—tobacco manufacturers?

A. Yes. To the best of my knowledge and belief.

X-Q. 19. You saw that name "Lorillard's" on there. So far as that name went you connected it with that tobacco company?

A. Directly or indirectly.

X-Q. 20. Well, the name "Lorillard's" on there wouldn't connect that up with any other tobacco company?

A. It didn't mean anything to me.

X-Q. 21. It meant the name Lorillard. You could read it?

A. I did.

X-Q. 22. You did not buy the tobacco at the time?

A. I did not.

X-Q. 23. Had no use for it?

A. No, sir.

X-Q. 24. You say it was several years ago when you first looked at this package of scrap tobacco and saw name "Lorillard's" on it?

A. Yes, sir.

X-Q. 25. And it was just recently that in the course of general conversation you were informed that the Beech-Nut Packing Company did not make this scrap tobacco?

A. Yes, sir.

X-Q. 26. So several years elapsed between those two occasions—between the time you first saw it and the time you were so told that the Beech-Nut Packing Company did not make the tobacco?

A. Yes, sir.

X-Q. 27. The matter wasn't of any particular interest to you to find out who made it?

A. No, sir.

X-Q. 28. You weren't selling tobacco, you weren't buying it?

A. No, sir.

X-Q. 29. And you didn't give it any thought?

A. I did give it a thought.

X-Q. 30. But you didn't give it enough thought during those years since you first saw the package to ask one of the Beech-Nut men, whom I presume you met frequently in the course of business, who makes the tobacco?

A. I did not ask any question about the tobacco.

X-Q. 31. Do you buy confectionery from other manufacturers outside of the Beech-Nut Packing Company?

A. I do.

X-Q. 32. Did you ever know in the confectionery business for one manufacturer to put the name of another manufacturer on its package of goods—I am not speaking of jobbers. I am speaking of one manufacturer to put another manufacturer's name on its goods.

A. I do not understand the question.

X-Q. 33. Did you personally ever know of the P.

Lorillard Company to make any tobacco products for the Beech-Nut Packing Company?

A. I did not.

X-Q. 34. Likewise you never heard of the Beech-Nut Packing Company making any products for P. Lorillard Company?

A. I did not.

X-Q. 35. You know these concerns are both manufacturing concerns, do you not?

A. I know Beech-Nut Packing Company is. I don't know that the Lorillard Company exists.

X-Q. 36. You say you do not know that the Lorillard Company exists?

A. No.

X-Q. 37. You have heard of them?

A. I have heard of them.

X-Q. 38. You said in one of your answers in your direct examination substantially that you thought that Lorillard might have been making this tobacco for the Beech-Nut Packing Company. If you didn't know that the Lorillard Company was in existence, how did you figure out that they were making tobacco for the Beech-Nut Packing Company?

A. Very simply. By the fact that I had reason to believe that many years ago the Lorillard concern had sold out and that simply the name of Lorillard remained.

X-Q. 39. So you really didn't know anything about the situation as concerned the Lorillard Company?

A. I did not. Definitely no.

X-Q. 40. If you went into a store and wanted to buy some chewing gum, could you be fooled or confused into accepting some chewing tobacco or cigarettes in the place of gum?

A. I cannot answer that question.

X-Q. 41. You mean to say you do not know the difference between tobacco and chewing gum?

A. I do.

X-Q. 42. You would not take chewing gum for tobacco?

A. I would not.

X-Q. 43. They are different goods, aren't they?

A. Yes, sir.

X-Q. 44. As you as a confectioner know they are different goods?

A. I do.

X-Q. 45. You know it from common sense standpoint?

A. I do.

Deposition closed.

Signature waived.

JOHN E. WATSON, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is John E. Watson; your age is 31; your residence is 3819 Michigan Ave., Chicago; your occupation is druggist, and your place of business is 679 North Clark Street, Chicago; is that correct?

A. Yes.

Q. 2. Mr. Watson, how long have you been in this drug store at 679 North Clark Street?

A. Perhaps two months.

Q. 3. What is your position there?

A. I am head prescription druggist in charge of place.

Q. 4. Prior to taking charge of this store at 679 North Clark Street, Chicago, what were you doing?

A. Manager of R. B. Sherry's, at 31st and Indiana.

Q. 5. What kind of a store is that?

A. It is a drug store.

Q. 6. How long have you been working in drug stores?

A. Nine years.

Q. 7. In the course of that time, have you sold cigarettes, cigars and other such products, and confectionery?

A. Yes, sir.

Q. 8. Have all the drug stores you worked in carried cigars, cigarettes, tobacco, chewing gum and confectionery?

A. All of them.

Q. 9. I show you a package of scrap tobacco, which is in this case as Plaintiff's Exhibit No. 3, being a package of Beech-Nut scrap tobacco. Have you ever sold this product over the counter?

A. Yes, sir.

Q. 10. How long have you sold it over the counter?

A. I would be right in saying five years and perhaps more.

Q. 11. I wish you would tell me whether you have sold very little of it or a good deal.

A. I have had in most places good business on it.

Q. 12. Do you now know who makes this Beech-Nut scrap tobacco?

A. No.

Q. 13. Prior to a few weeks ago, who did you believe made this Beech-Nut scrap tobacco?

A. I presumed it was put out by Beech-Nut Company, like the chewing gum.

Q. 14. Have you ever had occasion to talk about this scrap tobacco to your customers and, if so, what would you tell them about it?

A. I would tell them it was put out by same company as Beech-Nut gum was.

Q. 15. Was this true for the whole period of the five years?

A. Yes, sir.

Q. 16. Do you now believe that this scrap tobacco is made by Beech-Nut Packing Company—now this minute?

A. Well, I really don't know, because I never looked up on it. I always sold it.

Q. 17. Do you now believe that this is a Beech-Nut product or not? What do you believe about it now?

A. I suppose that it is.

Q. 18. You have said that you worked in the Sherry drug store prior to coming to your present store. Before that, where did you work?

A. Connor's, at 39th and Indiana.

Q. 19. Is that a drug store?

A. Yes, sir.

Q. 20. Is a big or small drug store?

A. Large drug store.

Q. 21. How do your present sales of Beech-Nut scrap tobacco, Plaintiff's Exhibit No. 3, compare with the sales that you had at Connor's drug store, for instance?

A. There is no comparison, because we haven't the tobacco displayed as we had at Connor's.

Q. 22. How was it displayed at Connor's store?

A. It was in a front case where it could be seen—the minute you walked to the cigar counter you could see the tobacco displayed in the case.

Q. 23. How is it placed now?

A. It is back behind the cigar counter, in a cabinet. No display at all.

Q. 24. Did a representative of the Beech-Nut Packing Company recently come to see you, do you remember?



A. Yes.

Q. 25. Did he tell you whether or not the Beech-Nut people made this tobacco?

A. I don't remember who he said made it. The best I remember he said cigarettes and tobacco weren't put up by the same people.

Q. 26. Were or were not?

A. Were not.

Q. 27. How long ago was that?

A. Perhaps three weeks ago.

Q. 28. Now, I direct your attention, Mr. Watson, to Beech-Nut cigarettes, in this case as Plaintiff's Exhibit No. 1, and show you a package thereof. Whose product did you think these were?

A. I presumed they were put up by same people as Beech-Nut scrap tobacco and gum.

Q. 29. How long have you handled these cigarettes?

A. A short while.

Q. 30. Have you yourself sold them over the counter?

A. I have sold a few.

Q. 31. Who makes the cigarettes, do you know?

A. I cannot say that I do.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. Do you smoke, Mr. Watson?

A. Yes, sir.

X-Q. 2. What do you smoke?

A. Cigars and cigarettes, both.

X-Q. 3. Do you chew?

A. No.

X-Q. 4. Did you ever buy any of that Beech-Nut scrap tobacco?

A. No.

X-Q. 5. You have bought it from wholesaler for drug company?

A. Yes.

X-Q. 6. Did you ever buy any Beech-Nut Packing Company products?

A. I bought scrap tobacco and the gum.

X-Q. 7. I am asking you did you ever buy any products of the Beech-Nut Packing Company?

A. I want to get you right. Is Beech-Nut scrap tobacco the Beech-Nut Packing Company products?

Mr. Cavanagh: Mr. Watson, I cannot answer that question for you, but I will try to clarify the situation. You have bought Beech-Nut chewing gum. From whom did you buy that?

A. I bought Beech-Nut gum from several stores.

X-Q. 8. Did you buy from Beech-Nut Packing Company man?

A. I cannot say that I did. Usually buy from jobbers.

X-Q. 9. You never had Beech-Nut Packing Company man call on you to sell gum?

A. If they have, I cannot say that I bought it.

X-Q. 10. Likewise, you don't know whether you ever bought any mints from the Beech-Nut Packing Company man?

A. I don't think I have.

X-Q. 11. Did you ever hear of P. Lorillard Company?

A. Who?

X-Q. 12. P. Lorillard, tobacco manufacturers.

A. I don't know whether I have. If I have, I haven't bought anything from them that I remember of.

X-Q. 13. As I understand it, you never bought a package of this Beech-Nut tobacco for your own use?

A. No.

X-Q. 14. Did you ever look at that package?

A. I have noticed it.

X-Q. 15. Did you ever see the name "Lorillard" on it?

A. Never paid any particular attention to it. As a matter of fact, it is same as Bull Durham. Didn't pay any attention to it.

X-Q. 16. Just simply sell it as so much tobacco?

A. That's the idea.

X-Q. 17. Does the same apply to the cigarettes?

A. Yes.

X-Q. 18. You never noticed name P. Lorillard Company on those cigarettes?

A. Never paid any particular attention to it.

X-Q. 19. These cigarettes come in cartons, do they not?

A. Same as other cigarettes.

X-Q. 20. They come in a carton like this—200—that I show you?

A. To the best I remember, that's the way they come.

X-Q. 21. Do you ever open up any of these cartons yourself?

A. Yes, sir, I have.

X-Q. 22. Did you ever read the printed slip that comes in them?

A. No.

X-Q. 23. Never even looked at it?

A. No. I never read those things.

X-Q. 24. So when you told people that you thought that the scrap tobacco and cigarettes were made by same people who made gum, you didn't have anything on which to base that?

A. No.

X-Q. 25. You had never asked any of the Beech-Nut salesmen who made it?

A. No.

X-Q. 26. I understand that you sell chewing gum in the store, do you not?

A. Yes, sir.

X-Q. 27. You never sold any person chewing gum when they asked you for cigarettes or scrap tobacco?

A. No.

X-Q. 28. In other words, they are entirely different classes of goods?

A. Why, sure.

X-Q. 29. You would not yourself be confused into taking chewing gum or mints for cigarettes or tobacco?

A. Not gum for tobacco.

X-Q. 30. Or mints either?

A. No.

Deposition closed.

Signature waived.

WILLIAM H. SAGE, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is William H. Sage; you are 54 years old; your residence is 121 Wheaton avenue, Wheaton, Illinois; your occupation is druggist?

A. Yes, sir.

Q. 2. Where are you employed now?

A. 421 North Clark street.

Q. 3. In what capacity?

A. Registered pharmacist.

Q. 4. Do you sell goods over the counter in that store?

A. Yes.

Q. 5. How long have you been selling goods over the counter in drug stores?

A. In any drug store?

Q. 6. Yes.

A. Twenty-five years.

Q. 7. Have you been selling for the past five or six years, and do you now sell cigarettes, chewing tobacco and cigars?

A. I haven't—only for the past two years have I been selling tobaccos and cigarettes.

Q. 8. Well, in the last two years that you have been selling tobacco and cigarettes have you been personally handing these goods out to the customer?

A. Yes, sir.

Q. 9. Have you in the past two years sold over the counter Beech-Nut chewing tobacco, similar to the package I now show you, Plaintiff's Exhibit No. 3?

A. Yes, sir.

Q. 10. Will you please state by whom you believed this chewing tobacco to be put out, up to the past few weeks?

A. I always supposed it was put out by same people who manufactured chewing gum called Beech-Nut chewing gum.

Q. 11. Do you now believe that this product is manufactured by the same people who manufacture the chewing gum?

A. I understand it is manufactured by Lorillard Company.

Q. 12. How and when did you obtain the information that this product was manufactured by the Lorillard Company?

A. In a conversation with a customer some two or three weeks ago my attention was called to the Beech-Nut cigarettes now put out by Lorillard Company. In that conversation I was informed that they were not put out by Beech-Nut people. Up to that time I was under the belief that all three of the products, the chewing gum, chewing tobacco and Beech-Nut cigarettes were all manufactured by the same people.

Q. 13. Do you remember having ever discussed the Beech-Nut scrap tobacco with your customers, and if so, do you remember what you told them about its origin?

A. I recall in conversation talking about cigarettes. Some customer stated that the cigarettes were a superior quality of cigarettes, and also that the chewing tobacco was. I made the statement that all of the products manufactured by the Beech-Nut Packing Company were of superior quality, stating at that time that their chewing gum with us had largest sale of any chewing gum on the market.

Q. 14. Do you recollect whether or not at previous times you have made similar statements during the two years that you were handling the scrap tobacco?

A. Yes. I suppose it's been something the same. I probably made the statement other times. I don't know how many times.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. Mr. Sage, do you chew?

A. No, sir.

X-Q. 2. Tobacco, I mean?

A. No, sir.

X-Q. 3. Did you ever personally buy a package of Beech-Nut scrap tobacco to chew?

A. No, sir.

X-Q. 4. Do you buy for your store?

A. I do the ordering. I am not the buyer. Mr. Healy, the proprietor, does the buying.

X-Q. 5. From whom do you order your Beech-Nut chewing gum?

A. Chewing gum we buy from wagon or from wholesale druggist.

X-Q. 6. What wagon is that; what concern?

A. I know his name, but cannot think of it. An individual. Don't recall his name. Oppenheimer, or something like that.

X-Q. 7. Don't buy direct from manufacturer?

A. No.

X-Q. 8. What is name of manufacturer of that gum?

A. I don't know that. Beech-Nut Products Company, or something of that kind.

X-Q. 9. You never took the trouble to look on a package and see the name of the company?

A. No. I know it is Beech-Nut something. I don't recall.

X-Q. 10. Did you ever hear of the P. Lorillard Company?

A. Oh, yes.

X-Q. 11. They are large manufacturers of tobacco, are they not?

A. Yes.

X-Q. 12. On this package of Beech-Nut cigarettes you see the name P. Lorillard?

A. Yes, sir.

X-Q. 13. That would indicate it is that tobacco company?

A. Yes.

X-Q. 14. And likewise on this Beech-Nut scrap tobacco you find the name Lorillard?

A. I didn't notice this until after a conversation with this gentleman.

X-Q. 15. As a matter of fact, when you told the party that the same people that put out the gum were putting out scrap tobacco and cigarettes, you had never really looked into the matter?

A. No.

X-Q. 16. Wasn't of any particular interest to you?

A. No. None whatever.

X-Q. 17. You continued to sell the cigarettes and the scrap tobacco, as well as the gum?

A. Yes, sir.

X-Q. 18. And you never made any inquiries from parties that you thought might know who put them out?

A. I was never interested in the manufacturer.

X-Q. 19. From standpoint of selling it meant nothing to you?

A. Oh, no.

X-Q. 20. If a person came into your store, Mr. Sage, and he wanted to buy some of the Beech-Nut scrap tobacco or Beech-Nut cigarettes, you would not hand him Beech-Nut gum for cigarettes?

A. I have.

X-Q. 21. Sold him one for the other?

A. You said pass it. People have come in and said give me a package of Beech-Nut. I have thrown out package of Beech-Nut gum, and they then said they wanted tobacco.

X-Q. 22. Did you ever have a person come in and say, "I want a package of Beech-Nut cigarettes," and you handed him gum?

A. Oh, no. People come in frequently—customers frequently say, "A package of Beech-Nut," and mean either tobacco or chewing gum. That happens every day. We have to ask them what they want. Whether they want chewing gum or tobacco.

X-Q. 23. When a man comes in and says, I want a package of Beech-Nut, and you hand him, say, gum, when subsequent events show he wanted cigarettes, what does he do?

A. That doesn't usually happen in cigarettes, as it does in chewing tobacco. A man in asking for Beech-Nut cigarettes usually says cigarettes, but man asking for chewing tobacco usually says "Beech-Nut," throwing down a quarter. The same thing in gum.



X-Q. 24. Suppose you give him the gum, when it subsequently appears that he wanted the chewing tobacco?

A. He says I want the tobacco, or I want the chewing gum.

X-Q. 25. In other words, he knows it's different—that there is a difference between the chewing gum and the chewing tobacco.

A. Immediately.

X-Q. 26. And he immediately says he wants the chewing tobacco?

A. Yes.

X-Q. 27. So he is not confused for an instant with the gum and the tobacco?

A. The customer is never confused. The clerk behind the counter is confused many times when man merely says he wants "Beech-Nut."

X-Q. 28. You yourself would not be confused or deceived into taking a package of Beech-Nut chewing gum when you really wanted either Beech-Nut cigarettes or scrap tobacco?

A. Oh, no.

X-Q. 29. They are entirely different classes of goods, are they not?

A. Oh, yes.

Cross-examination closed.

Deposition closed.

Signature waived.

A. H. CARLSON, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is A. H. Carlson; you are 23 years old; your residence is 5347 North Paulina Street, Chicago; you are employed by Thomas E. Wilson Company, sporting goods, is that correct?

A. Yes, sir.

Q. 2. In what capacity are you employed by the Thomas E. Wilson Company?

A. Bill clerk.

Q. 3. How long have you been with this concern?

A. Five months.

Q. 4. And what were you doing before that?

A. I was part owner of a cigar store.

Q. 5. Where was that cigar store located?

A. It was located at 5222 North Clark Street, Chicago.

Q. 6. How long did you have that store, Mr. Carlson?

A. Practically one year.

Q. 7. Did you sell scrap chewing tobacco in that store?

A. Yes, sir.

Q. 8. Please name some of the brands of scrap chewing tobaccos that you sold?

A. Honest Scrap, Polar Bear, Beech-Nut, Union Workman.

Q. 9. Which of these was your best seller?

A. Off-hand, I would say Beech-Nut.

Q. 10. Is the Beech-Nut scrap tobacco that you sold the same as this package I now show you, which is in

this case as Plaintiff's Exhibit No. 3, is this the Beech-Nut tobacco?

A. Yes, sir.

Q. 11. During the time that you were selling this tobacco over the counter, whose product did you think it was?

A. I was always under the impression that it was a product of the Beech-Nut Packing Company.

Q. 12. Did you ever tell your customers that it was a product of the Beech-Nut Packing Company?

A. Yes, I have.

Q. 13. Do you now believe that it is a product of the Beech-Nut Packing Company?

A. No.

Q. 14. You were first informed that it is not a product of the Beech-Nut Packing Company by whom?

A. As I remember the circumstances, a representative of the Beech-Nut Packing Company was in the store and we were discussing certain products. I believe the Beech-Nut scrap tobacco came under the question and then he told me that it was not one of their products.

Q. 15. Did you then ascertain whose product it was? Did you then find out who did make it?

A. Oh, yes.

Q. 16. Now, Mr. Carlson, of course you cannot give the exact number, but about how many times a day do you suppose you handed the Beech-Nut scrap tobacco out to customers in the store?

A. That is a hard question to answer. But you see part of the time I was in the store and the other part my partner was there. It may be that during the time I was there I would pass as many as five packages or more over the counter.

Q. 17. Did you sell Camel cigarettes over the counter?

A. Yes, sir.

Q. 18. In what quantities—many or few?

A. A great many, I would say.

Q. 19. What is written on a package of Camel cigarettes underneath the picture of the camel?

A. I do not know.

Q. 20. Have you sold Lucky Strike cigarettes over the counter?

A. Yes, sir.

Q. 21. Have you sold many or few?

A. A great many.

Q. 22. What is written on a package of Lucky Strike cigarettes underneath the red panel with the word Lucky Strike?

A. I don't know. I do know that it is a product of the American Tobacco people. I know that for a fact.

Q. 23. Now, who makes Murad cigarettes?

A. A Greek name—Anagyros or something like that.

Q. 24. Who makes Egyptian Deities?

A. The same concern.

Q. 25. Who makes Honest Scrap tobacco?

A. I don't know.

Q. 26. You know who makes Polar Bear tobacco?

A. No, sir.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. Mr. Carlson, how long were you in the tobacco business?

A. One year.

X-Q. 2. And what line of business were you in before that?

A. I wasn't in business before that. I was clerk in the office.

X-Q. 3. You were about 22 years old when you went into the tobacco business?

A. Yes.

X-Q. 4. I understand you to say that you sold this Beech-Nut scrap tobacco.

A. Yes.

X-Q. 5. Did you buy any of that tobacco? You did the buying?

A. Yes. I or my partner. Either one.

X-Q. 6. Who was your partner?

A. His name was G. E. Lindell.

X-Q. 7. What is his address?

A. I don't know his present address.

X-Q. 8. Could you give me an idea?

A. I know he lives on Hermitage Ave., near Hermitage.

X-Q. 9. Is that in Chicago?

A. Yes.

X-Q. 10. When you bought this Beech-Nut tobacco, from whom did you buy it?

A. Hesser Bros., jobbers.

X-Q. 11. What is their address?

A. I don't know their address. They are located on Halsted and Fullerton.

X-Q. 12. Are they wholesale jobbers?

A. Yes, sir.

X-Q. 13. When this tobacco would be delivered to your store, it would be in a large carton, would it not?

A. Yes.

X-Q. 14. About what were the approximate dimensions or sizes of those cartons?

A. I wouldn't be able to state that. Unusually large carton.

X-Q. 15. How many packages like this package would it hold?

A. I believe two or three dozen.

X-Q. 16. You are not sure?

A. No. You see it is five months since I have been in the business and of course I have forgotten things.

X-Q. 17. You weren't in the business long enough to become acquainted with the size and contents of the cartons?

A. Perhaps at that time I was. It has slipped my mind now.

X-Q. 18. As a matter of fact, Mr. Carlson, did you ever read any of the writing or printing on that carton?

A. No.

X-Q. 19. Did you ever take the trouble to read the printing on this Beech-Nut package?

A. I did after I had been told it wasn't a product of the Beech-Nut Packing Company.

X-Q. 20. Yes. Well, now you were in the tobacco business. You have heard of P. Lorillard Company?

A. Yes.

X-Q. 21. They are big well-known tobacco manufacturers?

A. Yes.

X-Q. 22. Did you buy any products from the Beech-Nut Packing Company?

A. I don't know whether we ever did buy anything direct.

X-Q. 23. You don't recall?

A. No.

X-Q. 24. On this package of scrap tobacco you see the name Lorillard, don't you?

A. Yes.

X-Q. 25. As a person engaged in the tobacco business that would mean that was a P. Lorillard Company?

A. Yes.

X-Q. 26. If you take the trouble to glance at that you would know that it was Lorillard tobacco?

A. Yes.

X-Q. 27. And you knew from general information at least that the Beech-Nut Packing Company was in the food product business?

A. Yes, sir.

X-Q. 28. Making Beech-Nut bacon and Beech-Nut chewing gum, and preserves and things of that sort?

A. Yes.

X-Q. 29. Wouldn't you as a tobacco man prefer to have tobacco made by well-known tobacco concerns than by a food concern?

A. I don't understand the question.

X-Q. 30. As a tobacco man, one engaged in the business, wouldn't it be your preference to use tobacco made by a tobacco concern than by a food concern?

A. Oh, certainly.

X-Q. 31. They would know more about the blends and details going with the tobacco?

A. Yes, they would.

X-Q. 32. You know of four concerns, the American Tobacco Company, the P. Lorillard Company, Liggett & Myers, and R. J. Reynolds. You have heard of those concerns?

A. Yes.

X-Q. 33. They are all top notchers and old concerns in the tobacco business?

A. Yes.

X-Q. 34. As a matter of fact when you bought this tobacco, you never made any inquiry to see who made it?

A. No.

X-Q. 35. You knew it was a good seller?

A. Yes.

X-Q. 36. And even after you found out that the Beech-Nut Packing Company did not make this, you continued to buy it and sell it?

A. Yes, sir.

X-Q. 37. And the very fact that Lorillard's name was on it would be a guarantee that it was good tobacco and you would continue to buy and sell it?

A. I presume so.

X-Q. 38. In other words, it didn't make a particular difference so far as that went whether it was somebody else so long as it was guaranteed by a good concern?

A. Yes.

X-Q. 39. You never had any person come in and say I want a package of Beech-Nut tobacco made by the Beech-Nut Packing Company, did you?

A. No, I didn't.

X-Q. 40. When you were buying this tobacco you never had any tobacco jobber come in and tell you that this was made by Beech-Nut Packing Company when you bought it?

A. No, sir.

X-Q. 41. So when you thought it was made by Beech-Nut Packing Company that was simply a general impression on your part without making any inquiry or study or examination at all?

A. Yes.

X-Q. 42. You had nothing to go on in forming that opinion? That is, if you had looked at the name Lorillard you would have known it was Lorillard tobacco; is that right?

A. Yes, I understand that.

X-Q. 43. You never saw any product of the Beech-Nut Packing Company with red radiating lines like on that package, did you?

A. I don't recall any.

X-Q. 44. If you see those red lines in the window, 10 feet off, you know that is Beech-Nut tobacco?

A. I wouldn't say that.



X-Q. 45. It's a general impression. It would seem to be Beech-Nut. As a tobacco man it would not look to you like a package of Honest Scrap, would it?

A. Sure not. It is not so much, the red lines, as that "Beech-Nut,"—sort of a trade-mark in the center.

X-Q. 46. You mean that word "Beech-Nut"?

A. Yes, and the formation of it.

X-Q. 47. Well, when that package is 10 feet off, or 20 feet off, in the window, the big package you have seen them, have red radiating lines, stand out like barber sign. You could tell it by the red radiating lines when you couldn't tell it by the wording?

A. Yes. That's true.

X-Q. 48. You never knew of any of these other brands to have these red radiating lines on them?

A. I don't know of any.

X-Q. 49. Did you ever take the trouble to look at a Beech-Nut Packing Company label?

A. No.

X-Q. 50. You don't know whether the oval on the Beech-Nut Packing Company mark is red or blue?

A. I don't know.

X-Q. 51. You don't know whether the Beech-Nut Packing Company mark has two red beech-nuts on it, do you?

A. No, sir.

X-Q. 52. Now, I will show you a mark of the Beech-Nut Packing Company, which is their label and is in this case as Defendant's Cross-Exhibit No. 8. Those two labels don't look very much alike?

A. Not when you compare them.

X-Q. 53. It was that word Beech-Nut that attracted your attention?

A. Yes, sir.

X-Q. 54. And the way that our tobacco products are displayed—some nailed high on the fences, some stuck

in the windows, the cartons piled up, as a matter of fact, it would be the red radiating lines which would be the Beech-Nut tobacco of Lorillard Company?

A. Yes.

X-Q. 55. Do you smoke yourself?

A. Yes, I smoke.

X-Q. 56. Have you seen the Beech-Nut cigarettes?

A. I have noticed a few of my friends carrying them around. Never smoked any myself.

X-Q. 57. You know it is a red package?

A. Yes, sir.

X-Q. 58. That looks like a package (Mr. Cavanagh shows witness a package of Beech-Nut cigarettes)?

A. Yes, sir.

X-Q. 59. That package has P. Lorillard on it?

A. Yes, sir.

X-Q. 60. That means to you that that is a package of Lorillard cigarettes?

A. Yes, sir.

X-Q. 61. Now, as I understand, you never looked at the large carton of Beech-Nut scrap tobacco to see if Lorillard's name was on it?

A. I believe I said I did before. After my opinion was corrected, when the Beech-Nut representative spoke to me about it, then I examined the package.

X-Q. 62. So the minute you looked at the package you saw Lorillard's name on it and knew it was Lorillard?

A. Yes.

X-Q. 63. If you had looked at that package when it first came into the store you would have known it was Lorillard?

A. Yes, sir.

X-Q. 64. You never took the trouble to look at it, then?

A. No.

X-Q. 65. What was this Beech-Nut man doing in your store? Was he just in there to buy some tobacco?

A. No, I believe he was in there to sell me some gum or some other candies, the candies in the package.

X-Q. 66. Do you remember buying anything from him?

A. I don't recall that.

X-Q. 67. Now, as one that's been in the tobacco business and as a person of good ordinary common sense, if you went into a store and you wanted a package of scrap tobacco or a package of cigarettes, could you be fooled or deceived into letting the dealer hand you a package of chewing gum, if you wanted cigarettes?

A. No, sir.

X-Q. 68. They are entirely different classes of goods?

A. Yes, sir.

X-Q. 69. You handled candy?

A. Yes, sir.

X-Q. 70. And chewing gum?

A. Yes.

X-Q. 71. You never tried to sell a man chewing gum when he wanted tobacco?

A. Sure not.

X-Q. 72. You don't think you could sell a man of ordinary common sense candy for tobacco?

A. Would be foolish to try to.

X-Q. 73. You never opened up a carton of the Lorillard cigarettes?

A. No, sir.

X-Q. 74. You did not handle those at the time?

A. They weren't distributed then.

X-Q. 75. I think that is all.

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 1. You were asked on cross-examination substantially as follows: "You never even glanced at the package of tobacco?" and I understood you to say that that was true. Did you reach for it in the store with your eyes closed?

A. Well, no, not that. I wouldn't take the trouble to examine the package closely every time I sold a package.

R-D. Q. 2. Would you consider chewing gum to be a food product?

A. Yes.

R-D. Q. 3. Why do you think chewing gum is a food product?

A. If it is not a food, we certainly all chew it. It is something to chew or eat, anyway.

R-D. Q. 4. I now call your attention to Defendant's Cross-Exhibit No. 8, and Plaintiff's Exhibit No. 3, being a Beech-Nut bacon label, and the Beech-Nut scrap tobacco package. Do you find a blue outline oval on each of these labels?

A. I find one on the tobacco package. I see one there also.

R-D. Q. 5. Do you find the word "Beech-Nut" just underneath inside the oval, hyphenated, in blue type, on either or on both of those packages?

A. On both.

R-D. Q. 6. Do you find a beech-nut underneath the hyphenated word "Beech-Nut"?

A. I do not understand.

R-D. Q. 7. Do you find a beech-nut cluster or representation of a beech-nut underneath the word "Beech-Nut" inside the oval?

A. Yes.

R-D. Q. 8. Now, referring to the part outside the blue line oval on both of these labels, what are the colors?

A. Solid red on the one, and red and white on this tobacco package.

R-D. Q. 9. Do you find any white in the red band in Defendant's Cross-Exhibit No. 8?

A. Yes.

R-D. Q. 10. You have testified on cross-examination that these labels were not similar when you compared them. After having now looked at the labels again, would you say that they were more similar than they were different, or more different than they were similar? It is a very difficult thing to answer, but give me your opinion.

A. When you examine them closely, you, of course, see there is a similarity between the two.

R-D. Q. 11. Which do you find in these labels to be more conspicuous, the similarities between the two or the differences between the two?

A. The similarities.

R-D. Q. 12. That's all.

Redirect examination closed.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 1. Mr. Carlson, I just want you to give me your frank, honest opinion about this thing. You recognize that as the Beech-Nut Packing Company label, that wide red band and yellow leaves on the cluster?

A. Yes, sir.

R-X Q. 2. If you saw it 2 feet away or 10 feet away you would recognize that as Lorillard scrap tobacco package?

A. I would recognize it as Beech-Nut scrap tobacco.

R-X Q. 3. What would make you recognize that as Beech-Nut scrap tobacco?

A. The fact that Beech-Nut is in the center of it.

R-X Q. 4. What else at a distance?

A. The red and white colors arranged in a particular manner.

R-X Q. 5. The way the Beech-Nut tobacco is arranged?

A. Yes.

R-X Q. 6. And those lines running out from that oval?

A. Yes.

R-X Q. 7. That would make you recognize that package?

A. Yes.

R-X Q. 8. You don't find any such thing as that on that Beech-Nut Packing Company bacon label?

A. No, I don't.

R-X Q. 9. And it strikes your eye as that same impression, does it?

A. When you consider the two that way, you can see the differences. It strikes your eye.

R-X Q. 10. It hits you like blow between the eyes, doesn't it?

A. You have seldom any cause to make the comparison that way.

R-X Q. 11. If this red Beech-Nut Packing Company oval, with the words printed on it, was on a blue package, like that tobacco, you would recognize that, too?

A. No, sir.

Question is objected to as calling for an opinion.

R-X Q. 12. You spoke of a blue oval here on the Beech-Nut Packing Company bacon label. You don't find any red lines radiating from the oval, do you?

A. No, sir.

R-X Q. 13. Now, you spoke about you didn't examine the package closely. Isn't it a matter of fact that you never looked at the package to see name Lorillard on it? You are a tobacco man and you stated that you knew the Lorillard Company, and you stated that you never looked to see whether Lorillard was on it or not.

A. I never looked closely to see that their name was on there except after I was informed by Beech-Nut Packing Company representative that it wasn't their product.

R-X Q. 14. You never looked at it to see whose name was on it?

A. No, sir.

R-X Q. 15. Will you take that package and see if you can find Beech-Nut Packing Company's name on it?

A. No, I cannot find it.

R-X Q. 16. So, if I would come into your store when you first got this tobacco and asked you to look at the package and tell me if Lorillard or Beech-Nut tobacco, who would you have told me?

A. Lorillard.

Recross-examination closed.

*Re-Re-direct Examination by Mr. Hinton.*

R-R-D. Q. 1. Mr Carlson, you have testified that you have told customers that the tobacco was a product of the Beech-Nut Packing Company. Did those customers ask you to look the package over and then tell them whose product it was?

A. No, sir. I had always been under the impression that it was a Beech-Nut product.

Re-redirect examination closed.

*Re-Re-cross-Examination by Mr. Cavanagh.*

R-R-X Q. 1. You had been under that impression without ever looking at the package to tell whose it was?

A. Yes, sir.

Deposition closed.

Signature waived.

ARTHUR E. FECHTER, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is Arthur E. Fechter; your residence is 521 North Clark street; you are 59 years old; and you are the proprietor of a drug store; is that correct?

A. Yes.

Q. 2. I show you a package of Beech-Nut scrap tobacco, in this case as Plaintiff's Exhibit No. 3. Have you ever sold this product over the counter in your store, Mr. Fechter?

A. I have.

Q. 3. How long have you sold it over the counter?

A. About two years.

Q. 4. Up to within very recently, whose product did you believe it was?

A. Beech-Nut Company.

Q. 5. Do you now believe that it is a product of the Beech-Nut Company?

A. I know it is not.

Q. 6. How did you get your information that it was not?

A. One of the salesmen told me it wasn't.

Q. 7. One of whose salesmen?

A. I don't know who they are. I don't give salesmen much attention. I am bothered with them all day long. Don't know who he was.

Q. 8. Do you remember, Mr. Fechter, whether he stated to you at the time what company he represented?

A. No.



Q. 9. Do you know now who makes this scrap tobacco?

A. I do not.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. Do you sell cigarettes and other tobacco supplies?

A. I do.

X-Q. 2. Do you sell such cigarettes as the Murad?

A. I do.

X-Q. 3. The Mogul?

A. I do.

X-Q. 4. Do you sell any Beech-Nut cigarettes?

A. I do.

X-Q. 5. Who do you get these tobacco supplies from?

A. Sol Blum?

X-Q. 6. Do you get all your tobacco supplies from this Sol Blum?

A. All cigarettes—I do.

X-Q. 7. Do you sell chewing gum?

A. I do.

X-Q. 8. Beech-Nut chewing gum?

A. I do.

X-Q. 9. Who do you get that from?

A. I get that from the wholesale candy man or wholesale drug house.

X-Q. 10. You don't get it from Sol Blum?

A. No, I don't.

X-Q. 11. He's the tobacco man?

A. Yes.

X-Q. 12. Do you get the cigarettes and this Beech-Nut tobacco from Sol Blum?

A. Yes. I haven't sold enough tobacco and cigarettes to talk about.

X-Q. 13. Did you ever hear of the P. Lorillard Company tobacco people?

A. Yes.

X-Q. 14. You have handled some of their goods?

A. I think so.

X-Q. 15. Did you ever take the trouble to look at that package and examine it?

A. No.

X-Q. 16. Do you still continue to buy this tobacco?

A. Certainly.

X-Q. 17. You don't have any interest in who it was made by?

A. No.

X-Q. 18. You noticed Lorillard's name on package?

A. I do now.

X-Q. 19. That would indicate to you that that was Lorillard's product?

A. I presume so.

X-Q. 20. I show you a carton of Beech-Nut cigarettes, which is in this case as Defendant's Cross-Exhibit No. 9. Have you bought cigarettes like that in cartons?

A. Well, I bought Beech-Nut cigarettes. Haven't bought enough to remember. Haven't handled cigarettes only couple of weeks. Not in charge of that department.

X-Q. 21. Never paid any attention to cigarettes?

A. No.

X-Q. 22. If you went into a store and wanted a tobacco product, such as this scrap tobacco, or a package of cigarettes, could you be fooled into taking chewing gum in place of scrap tobacco or cigarettes?

A. No. I shouldn't think so.

X-Q. 23. Entirely different class of goods?

A. I wouldn't take gum for tobacco or cigarettes.

X-Q. 24. And if a man wanted to buy some cigarettes and asked you for cigarettes or scrap tobacco, you wouldn't hand him gum?

A. What kind of a darn fool question is that? You don't take me for a damn fool, do you? I won't listen to that stuff.

(Witness got up and walked out of room and left office. Said he wouldn't listen to such "Damn fool stuff.")

Mr. Hinton: If Mr. Cavanagh desires to continue the cross-examination, an immediate subpoena will be served upon the witness, who was voluntarily attending, and he will be produced for further examination.

Mr. Cavanagh: That is not necessary.

Deposition closed.

Signature waived.

CHARLES O. LARSON, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. Charles O. Larson; 11419 Prairie Ave., Chicago; grocer; 33.

Q. 2. I show you a package of Beech-Nut scrap tobacco which is in this case as Plaintiff's Exhibit No. 3, and a package of Beech-Nut cigarettes which is in this case as Plaintiff's Exhibit No. 1. Will you please tell me when you first saw either or both of these products?

A. The tobacco I saw several years ago and the cigarettes I have just seen here just last month or so.

Q. 3. Taking the cigarettes up first, when you saw these cigarettes, by whom did you believe they were made?

A. By the Beech-Nut Packing Company that puts out food products.

Q. 4. Did a Beech-Nut salesman subsequently call upon you?

A. After I saw the cigarettes, he called.

Q. 5. And you remember whether you said anything to him about them?

A. As near as I can recollect, I said "Hello, Beech-Nut." That is the name we generally call them by. Heard his name and seen his name several times on orders but recall him more as "Beech-Nut." "You are the very man we are looking for. Since when has Beech-Nut Packing Company been putting out cigarettes? If so, I am off of you for life."

Q. 6. Would you recognize the man's name if I spoke it?

A. Yes.

Q. 7. Is it Southern?

A. That's it. I recollect that by his Southern brogue he has.

Q. 8. When you made this remark to the Beech-Nut Packing Company salesman, were you joking?

A. No, sir. I am very much opposed to cigarettes.

Q. 9. Would you as a matter of fact stop handling Beech-Nut products if the Beech-Nut Packing Company were in fact getting out cigarettes?

A. If I thought they were.

Mr. Cavanagh: That is objected to as immaterial.

Q. 10. Now about the scrap tobacco, Plaintiff's Exhibit No. 3, whose product did you think this was?

A. I never gave that much thought. Had seen it and never thought much of it, until I saw the Beech-Nut cigarettes and then it dawned on me very forcibly.

Q. 11. Whose product did you think it was?

A. Naturally the same as the other.

Q. 12. Product of whom?

A. Beech-Nut Packing Company.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. Do you sell the Beech-Nut Packing Company line of products?

A. Some of them.

X-Q. 2. Do you sell chewing gum?

A. Yes, sir.

X-Q. 3. Do you sell some of their food products?

A. Yes, sir.

X-Q. 4. Do you sell tobacco?

A. No, sir. None whatever.

X-Q. 5. Neither cigarettes or chewing tobacco?

A. No, sir.

X-Q. 6. Do you smoke cigarettes?

A. No, sir. I wouldn't be caught with one in my mouth.

X-Q. 7. Do you chew tobacco?

A. No, sir.

X-Q. 8. Do you use tobacco in any form?

A. Smoke cigars.

X-Q. 9. You are opposed to cigarettes and chewing tobacco?

A. I cannot stand smell of cigarettes.

X-Q. 10. You don't like chewing tobacco?

A. I am not directly opposed to that as I am cigarettes, although I never have tasted it.

X-Q. 11. Did you ever buy a package of those Beech-Nut cigarettes?

A. No, sir.

X-Q. 12. Did you ever buy a package of that Beech-Nut scrap tobacco?

A. No, sir. Have no use for it.

X-Q. 13. Did you ever take the trouble to look at a package?

A. Have looked at it tonight. Never took trouble to closely examine it.

X-Q. 14. You never prior to tonight took trouble to read printing on the package?

A. No, sir. I am not interested.

X-Q. 15. I suppose the same applies to the cigarettes?

A. Yes, sir.

X-Q. 16. Did you ever hear of the P. Lorillard Company, tobacco manufacturers?

A. No, sir.

X-Q. 17. You don't deal with any or buy any goods from any tobacco jobbers at all?

A. Wholesale jobbers and grocers, they handle tobacco.

X-Q. 18. You don't buy any tobaccos yourself?

A. No, sir.

X-Q. 19. You have no interest in either the scrap tobacco or the cigarettes?

A. None whatever.

X-Q. 20. The only reason that you felt that you wouldn't buy any more Beech-Nut Packing Company products was because you thought they might put out cigarettes and you were opposed to cigarettes?

A. Yes, sir.

X-Q. 21. If you went into a store, and wanted to buy Beech-Nut Packing Company food product or Beech-Nut gum, could you be fooled into taking either that Beech-Nut scrap tobacco or the cigarettes in the place of the food product or gum?

A. I hope not.

X-Q. 22. Likewise if a customer came into your store

and asked for Beech-Nut gum or food product, would you try to hand him that Beech-Nut tobacco or cigarettes?

A. Not unless I was drunk.

X-Q. 23. You consider them entirely different classes of goods?

A. Absolutely.

Deposition closed.

Signature waived.

JOHN SABELIS, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is John Sabelis; your age is 29; your residence is 11524 Eggleston Ave., Chicago; your occupation is clerk. Is that correct?

A. Yes.

Q. 2. What were you doing between the months of July, 1919, and the summer of 1921?

A. Working for the Harvester Company.

Q. 3. The International Harvester Company?

A. Yes, sir. West Pullman works.

Q. 4. What kind of work?

A. Efficiency department.

Q. 5. Did you ever work in the commissary department?

A. Yes, sir. Department took charge of that.

Q. 6. What did you sell in the commissary department?

A. Tobacco, candies, gum, later on we took on overalls and shoes.

Q. 7. Did you sell chewing tobaccos?

A. Yes, sir.

Q. 8. What brands did you sell of scrap chewing tobaccos?

A. Beech-Nut, Mail Pouch, Scrap.

Q. 9. You have mentioned the Beech-Nut scrap chewing tobacco. Was that this tobacco that I now show you, which is in this case as Plaintiff's Exhibit No. 3? Is this the same as that you sold?

A. Yes, sir.

Q. 10. Did you yourself pass out this tobacco to the customers who bought it?

A. Yes, sir.

Q. 11. I mean did you sell it over the counter?

A. Yes, sir.

Q. 12. Mr. Sabelis, during this period of approximately two years, who did you think made this chewing tobacco?

A. I thought that the Beech-Nut Peanut Butter Company and Beech-Nut chewing gum made it. I thought that came from the same company.

Q. 13. How many packages a day of this chewing tobacco do you suppose you personally handed out over the counter? Of course I want an average.

A. About fifty packages of Beech-Nut chewing tobacco.

Q. 14. Do you know who makes this chewing tobacco?

A. No, sir. I don't.

Q. 15. Did you ever notice the name of the manufacturer anywhere on the package?

A. No, sir.

Direct examination closed.



*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. Did you ever look for the name of the manufacturer on it?

A. No, sir. I don't chew myself and I am not interested.

X-Q. 2. So you weren't interested in what appeared on the package?

A. No, sir.

X-Q. 3. Did you ever hear of the P. Lorillard Company, tobacco manufacturers?

A. I believe I have.

X-Q. 4. Will you look at that package? You see the name "Lorillard" on it, do you not?

A. Yes, sir. I do.

X-Q. 5. These packages of tobacco—when you were selling them over the counter—you took them out of a large carton, didn't you?

A. Yes, sir.

X-Q. 6. And that carton contained, we will say generally speaking, several dozen of these packages, that carton also had a large number of red radiating lines like on this package?

A. Yes, sir.

X-Q. 7. You never took the trouble to notice any of printing on that package, whether it had name "Lorillard" on it?

A. No, sir.

X-Q. 8. You weren't at all interested in what was on it or who made the tobacco?

A. No, sir.

X-Q. 9. I understood you to say that you also sold chewing gum and candy and different things like that?

A. Yes, sir.

X-Q. 10. This commissary department is a sort of

general store—I mean what we would liken to a general store?

A. For employees only.

X-Q. 11. They sold everything from clothing to tobacco and different articles?

A. Not clothing. Overalls and work shoes.

X-Q. 12. You sold those?

A. Yes, sir.

X-Q. 13. You never had a man or a customer come up to you and ask you for some chewing gum and you handed him over a package of this chewing tobacco?

A. I have.

X-Q. 14. You have sold a man chewing tobacco when he said he wanted gum?

A. I have had a man ask me for a package of Beech-Nut.

X-Q. 15. And without designating whether he wanted gum or tobacco. But when a man said I want a package of Beech-Nut chewing gum, you wouldn't hand him a package of tobacco?

A. No, sir.

X-Q. 16. You wouldn't do so?

A. No.

X-Q. 17. In other words, you know the difference between tobacco and chewing gum?

A. Yes, sir.

X-Q. 18. You would think that if customer was of ordinary intelligence, he would know the difference?

A. Yes, sir.

X-Q. 19. You, yourself, if you went into a store and you wanted chewing gum, you couldn't be fooled into taking a package of this tobacco for gum?

A. No, sir.

X-Q. 20. You would think the man crazy to try to sell it?

A. I sure would.

X-Q. 21. All that's because they are entirely different classes of goods?

A. Yes, sir.

Deposition closed.

Signature waived.

DARRELL S. BOYD, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories, propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is Darrell S. Boyd, your age is 31; your residence is Winnetka, Illinois; your occupation is lawyer; your office is in the Corn Exchange Bank Building, corner of LaSalle and Adams; is that correct?

A. Yes.

Q. 2. I show you a package of Beech-Nut cigarettes, which is in this case as Plaintiff's Exhibit No. 1. Have you ever purchased a package of these cigarettes?

A. Yes, I have purchased a number.

Q. 3. When, and where, did you purchase them, do you remember?

A. All the purchases I have made have been at the cigar stand in the lobby of the Corn Exchange Bank Building, corner Adams and LaSalle. Purchases have ranged every three or four days for the last month.

Q. 4. Do you know who runs that cigar stand?

A. It's run by one of those chain tobacco stores. I am not sure—either Breitung or Shelby. I think it is Breitung.

Q. 5. Did you make these purchases from a clerk whom you had previously seen there?

A. You refer to any one purchase? I ordinarily purchase them from same clerk, who is behind stand prac-

tically every day, and at most times of the day except at lunch hour, when he is relieved.

Q. 6. Did you have any conversation with the clerk when you were making your purchase?

A. I made a purchase of a package of cigarettes about three weeks ago—just as I was coming back from lunch. I had noticed these advertisements and I don't know but what I had some conversation with you on the train or somewhere before that. I was curious to know what he would say about the maker of the product, so when I purchased the package of cigarettes I asked him if the cigarettes were made by the same company who marketed the Beech-Nut bacon and the other well known Beech-Nut products. He said that it was—that they were the product of the same company that got out Beech-Nut bacon and Beech-Nut candies and Beech-Nut gum and various other Beech-Nut products. I then called his attention—I picked up the package and called his attention to the name P. Lorillard underneath. I said, "If that's the case what do you make of this? What does P. Lorillard on the label mean?" And he said, "Oh, they are all made by the same company." I said, "The P. Lorillard Company is not the company that gets out Beech-Nut bacon." He said, "No. But they are all the same concern. The Beech-Nut bacon company owns or controls the P. Lorillard Company. It's all the same crowd."

Q. 7. Have you had any other conversation with any other clerk selling Beech-Nut cigarettes, or made any other purchases of Beech-Nut cigarettes besides the one you have just described?

A. No. I have never made any purchases of Beech-Nut cigarettes except at this counter.

Q. 8. Have you made any inquiries about Beech-Nut cigarettes from any other tobacco clerks?

A. Not from any other tobacco clerks.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. What did you say your occupation was?

A. Lawyer.

X-Q. 2. Where are your offices located?

A. Corn Exchange Bank Building.

X-Q. 3. Are you in any way connected with the Beech-Nut Packing Company?

A. No.

X-Q. 4. How did you happen to start this conversation with this clerk; what led you to do that?

A. I think the reason I started it was because I knew the controversy was on. I think I had some casual conversations with Mr. Hinton.

X-Q. 5. Do you live near Mr. Hinton?

A. Live in the same town.

X-Q. 6. That's out at Winnetka?

A. Yes. Winnetka.

X-Q. 7. When you went into this store, you knew that the cigarettes were the product of the P. Lorillard Company?

A. I knew they were.

X-Q. 8. So you weren't yourself laboring under any misapprehension on that point?

A. No.

X-Q. 9. You started this conversation?

A. I started the conversation.

X-Q. 10. How large a store is this?

A. Just a counter in the lobby. Say about 10 feet long, possibly.

X-Q. 11. And you know this clerk's name?

A. I don't know his name, no.

X-Q. 12. How old a chap is he?

A. I should say a man about 50 years old. Gray-haired gentleman. Behind the counter to my recollection for three or four years.

X-Q. 13. Just a clerk at the place?

A. I assume he is.

X-Q. 14. What do they sell at that counter besides tobacco?

A. They sell gum and candy, and have some apples, I believe, on display.

X-Q. 15. One of these little stands like you usually see in office buildings?

A. Yes. A cigar stand.

X-Q. 16. Little retail stand?

A. Little retail stand.

X-Q. 17. You say you don't know the name of the concern that runs that stand?

A. I am not sure whether it's Schulte or Breitung. If you look in the telephone book you will find it.

X-Q. 18. You have stated that you are a lawyer. This clerk didn't show you any documentary evidence, or what you might call authentic data in support of his statement, did he?

A. No. Just sort of gossip across the counter. If I may explain my motives there a little more fully. I was not collecting evidence from this clerk with any thought of testifying, but I was curious to know how far these vendors of tobacco were fooled on the proposition that it was marketed by the Beech-Nut bacon crowd. I had been rather curious when I first saw the advertisements. I knew some ordinary purchasers were fooled. I was rather curious to see how far that went.

X-Q. 19. In your instance here it appears to have been a question on the part of this clerk as to the ownership of the companies, as to who controlled the companies?

A. No. It was a pure question of whose product this was.

X-Q. 20. I understand you showed him the name P. Lorillard on that?

A. That was after I had asked him whose product it was.

X-Q. 21. Then you showed him the name P. Lorillard on the package?

A. After I had asked him whose product it was?

X-Q. 22. Yes.

A. He told me it was a Beech-Nut product.

X-Q. 23. I understand that.

A. Marketed by same crowd that got out bacon and gum. Then I showed him the label and was curious to know how he would get around that, and he maintained his stand even then, and waved me aside with the proposition that it was all controlled by the same interests. I had no incentive to pursue argument any further.

X-Q. 24. Then you didn't ask him if he knew of the P. Lorillard Company, did you?

A. No.

X-Q. 25. Nor the size of that concern?

A. No.

X-Q. 26. Or call his attention to the length of time the Lorillard Company had been in existence?

A. No.

X-Q. 27. 160 years?

A. I didn't know that.

X-Q. 28. I show you the package of cigarettes. Will you read the last two lines on that panel?

A. Yes.

X-Q. 29. What does it say?

A. "P. Lorillard Company. Established 1760." First time I ever noticed that.

X-Q. 30. So you didn't go into any of these questions at all?

A. No. I wasn't interested in the case. I was just interested in his personal reaction.

X-Q. 31. You wouldn't consider tobacco or cigarettes

to be the same class of goods as food products, so that you would take one for the other—tobacco instead of bacon for Sunday morning breakfast?

A. Hardly.

X-Q. 32. Because they are different kinds of goods?

A. No. Because I don't like cigarettes for breakfast.

X-Q. 33. They are different kinds of goods?

A. I don't think tobacco is food.

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 1. What is the address of the Corn Exchange Bank Building?

A. 134 South LaSalle street.

R-D. Q. 2. What is 136 South LaSalle street?

A. That must be the entrance of the bank. The bank entrance proper is one door to the south. Both enter into the same lobby.

R-D. Q. 3. In the Chicago telephone book I notice a list of seventeen Breitung stores, including one at 136 South LaSalle street. Is the Albert Breitung whose name here appears the chain cigar store man whom you referred to?

A. Yes.

Mr. Hinton: That's all.

Mr. Cavanagh: That's all.

Deposition closed.

Signature waived.



M. W. RYAN, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you please state your name, age, residence, and occupation?

A. M. W. Ryan; 31 years; 504 Douglas avenue, Elgin, Illinois; employed by the National Vending Service Company, looking after the stock.

Q. 2. You are here in response to subpoena, are you not?

A. Yes, sir.

Q. 3. To whom do you supply stocks?

A. Stands operated by National Vending Service Company on the elevated roads.

Q. 4. How many of these stands are there?

A. I will say there are about sixty-two. We add and subtract.

Q. 5. Do you stock these stands with Beech-Nut scrap tobacco, in evidence as Plaintiff's Exhibit No. 3, a package of which I now show you?

A. Yes, sir.

Q. 6. In stocking these dealers with this tobacco, can you tell me what your experience has been?

A. They have asked if it is a product taken care of and manufactured by same company that makes gum and candy.

Q. 7. Could you give me an idea of how often that has happened in any way?

A. It has happened many times.

Q. 8. And what have you told them?

A. I have had to tell them that the product was not made by the same company that made the gum.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. Do you know the P. Lorillard Company puts out that tobacco?

A. Yes, sir.

X-Q. 2. Do you do any of the buying for your concern?

A. I look after that.

X-Q. 3. And you buy that tobacco from Lorillard agency, do you not?

A. Well, through their local office.

X-Q. 4. From P. Lorillard?

A. Yes, sir.

X-Q. 5. You know it is the Lorillard Company's product?

A. Surely.

X-Q. 6. This concern that you work for, just what is its line of business?

A. They vend newspapers and magazines on the elevated roads. Not all, but a part of them.

X-Q. 7. Newspapers, magazines, candies and tobacco, cigarettes, chewing tobacco, and things of that sort? Now, these stands that have asked you if this scrap tobacco was made by the same company that made Beech-Nut gum and food products, you don't know whether they ever took the trouble to look at package and see Lorillard's name on it, as far as you know?

A. I cannot say as to that.

X-Q. 8. As far as you know, you don't know whether they ever took trouble to look on package and see who made it?

A. No.

X-Q. 9. You still continued to deliver this tobacco to these stands?

A. Whenever they wanted it.

X-Q. 10. People who have asked the question as to

whether it was made by the people who make Beech-Nut gum and food products, they still continue to take that tobacco, even after you tell that it is Lorillard's?

A. I don't know if they are the same people or not. We send it every time they want it.

X-Q. 11. You have steady demand?

A. Well, right along.

X-Q. 12. How long have you been delivering that tobacco to the stands, approximately?

A. I haven't been with them very long. I can't say as to how long it was.

X-Q. 13. How long have you personally?

A. Two years, January.

X-Q. 14. All that time you have been delivering this tobacco?

A. Yes, sir.

X-Q. 15. You also deliver gums and candies?

A. Yes, sir.

X-Q. 16. If a customer of one of these stands ordered some Beech-Nut chewing gum or Beech-Nut candy, you wouldn't deliver this Beech-Nut tobacco in place of candy or gum—you wouldn't confuse the two?

A. They specify Beech-Nut gum or Beech-Nut tobacco.

X-Q. 17. If they wanted Beech-Nut gum you wouldn't give them tobacco?

A. Not unless they made a mistake in store in sending it in.

X-Q. 18. You yourself know the difference between chewing gum and tobacco?

A. Absolutely.

X-Q. 20. Absolutely different kinds of goods?

A. Yes.

Mr. Cavanagh: That's all.

Deposition closed.

Signature waived.

EUGENE C. SULLIVAN, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Eugene C. Sullivan; 7632 North Marshfield; 31; advertising salesman.

Q. 2. By whom are you employed?

A. Chicago Elevated Advertising Company.

Q. 3. You are here in response to a subpoena, are you not?

A. Yes, sir.

Q. 4. I show you a package of Beech-Nut scrap tobacco, in this case as Plaintiff's Exhibit No. 3. Have you ever seen a similar package of scrap tobacco or an advertising display thereof?

A. I have never seen a package of tobacco until to-day. I have, however, seen a window cut-out reproducing the package, a little larger than the actual size, if I recall.

Q. 5. How big was the window cut-out, do you suppose?

A. I should imagine in length—it was made up of three panels. The right and left panels were probably, to my recollection, a foot wide, the center one about two and one-half feet wide. It was two and a half feet high or three feet high.

Q. 6. Now, when you saw that cut-out, whose product did you think was being advertised?

A. I happened to be going along East Illinois street, near the Pugh warehouse. I saw, in a rather dilapidated water front saloon, an equally dilapidated cut-out. In my recollection it was red and white. It was new to me,

and being an advertising man and observant of all new products, it caught my attention, at least the name "Beech-Nut" did. I was first impressed that probably it was a product of the Beech-Nut Packing Company, but on closer inspection, due to the cheapness of the cut-out itself, I was immediately impressed that it couldn't be a printing job or a lithographing job, such as quality maintained by Beech-Nut Packing Company, so I immediately assumed that it was not a product of the Beech-Nut Packing Company.

Q. 7. I call your attention to the word "Lorillard's," which appears on the top of this package. When did you first see that name "Lorillard's"?

A. Today, when you called my attention to it.

Q. 8. That's all.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. Did you ever buy any of this Beech-Nut scrap tobacco?

A. No.

X-Q. 2. Prior to today you never had a package in your hand to look at it?

A. No.

X-Q. 3. Did you read the printing matter on that lithograph sign you spoke of?

A. The chances are I did. At this late day I couldn't recall if I did or not.

X-Q. 4. Did you see Lorillard's name on it?

A. No.

X-Q. 5. You couldn't say whether or not Lorillard's name was on that?

A. No.

X-Q. 6. How close were you to the sign when you saw it?

A. It was in a window, must have been about 3 feet away.

X-Q. 7. Did you ever hear of the P. Lorillard Company?

A. No.

X-Q. 8. How long have you been in the advertising business?

A. About fifteen years, off and on.

X-Q. 9. Do you solicit orders for advertising?

A. Yes.

X-Q. 10. And you never heard of P. Lorillard Company?

A. No, sir. I believe they are Eastern manufacturers, so I naturally wouldn't be interested.

X-Q. 11. Do you do any tobacco advertising?

A. I personally?

X-Q. 12. Do you solicit orders for any tobacco advertising?

A. No, sir.

X-Q. 13. Have you ever handled any tobacco advertising accounts?

A. No, sir. I am working on one now. Near as I ever got to it.

X-Q. 14. Have you ever heard of the American Tobacco Company?

A. Yes, sir.

X-Q. 15. Liggett & Myres?

A. Yes, sir.

X-Q. 16. R. J. Reynolds Tobacco Company?

A. Yes, sir.

X-Q. 17. Yet you never heard of the oldest of them, P. Lorillard Company?

A. No, sir.

X-Q. 18. Did you ever hear of Climax tobacco?

A. Yes.

X-Q. 19. Did you ever hear of "Between the Acts"?

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5  
9

A. Yes, sir.

X-Q. 20. Murad cigarettes?

A. Yes, sir.

X-Q. 21. Mogul cigarettes?

A. Yes, sir.

X-Q. 22. Sensation tobacco?

A. No, sir.

X-Q. 23. Union Leader?

A. No, sir.

X-Q. 24. Muriel cigars?

A. Yes, sir.

X-Q. 25. You have heard of Egyptian Deities?

A. Yes, sir.

X-Q. 26. You have heard of this Beech-Nut tobacco?

A. Only on these two occasions.

X-Q. 27. Now as an advertising man, wouldn't you say that a firm that manufactured and marketed those tobacco brands I have just mentioned to you ought to be a pretty big and pretty well-known firm?

A. Yes, sir.

X-Q. 28. And you would expect an advertising man to know of them?

A. Not necessarily.

X-Q. 29. You knew the other three tobacco concerns I have mentioned?

A. Yes.

X-Q. 30. Knew those the minute I mentioned them, quite well?

A. No, not quite well. You couldn't tack me down to where I have seen those. I don't even know who makes Camel cigarettes and I smoke them all the time.

X-Q. 31. What accounts in the advertising do you work particularly for?

A. We don't specify on anything. I have, however, been fortunate in handling bank accounts and amusement places.

X-Q. 32. Programs?

A. No. Elevated advertising.

X-Q. 33. Theatrical programs?

A. No.

X-Q. 34. Ball rooms?

A. Those have been what I specialize in and exploitation of moving picture features.

X-Q. 35. So you have never paid any attention at all to the tobacco advertising, have you?

A. No, sir, for the simple reason that I assumed and accepted that the main office of most of them was in New York. My territory is Chicago.

X-Q. 36. You never made any study of this industry as connected with advertising to find out its possibilities and its probabilities?

A. No, sir.

X-Q. 37. You never made any attempt to get any of those advertising accounts for your territory?

A. No, sir. It is not our policy to cover the eastern territory. It is already covered by eastern office.

X-Q. 38. You mean to say that your eastern office would handle advertising of tobacco products in Chicago?

A. Absolutely.

X-Q. 39. You wouldn't pay any attention to that at all?

A. No, sir.

X-Q. 40. You say that this sign that you saw in the window had a three panel advertisement. What appeared on that beside the word "Beech-Nut"? Could you describe that sign in general?

A. Only what I gave you. The only thing I recall now is that it was red and white.

X-Q. 41. Don't know whether it had a blue girl on it or not?



A. No, sir. I don't recall what the side panels had at all. The only thing I recall is what the center panel had.

X-Q. 42. You don't know whether the red and white represented a package?

A. Yes. I recall that.

X-Q. 43. Was the package held by girl?

A. I couldn't recall that. I don't know details of sign.

Deposition closed.

Signature waived.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF  
NEW JERSEY.

Beech-Nut Packing Company }  
                                  *vs.* } 3056.  
P. Lorillard Company. }

**Stipulation.**

It is stipulated by and between the parties through their respective counsel that if the parties whose names are appended hereto were called to testify in this case they would each testify as follows:

*Direct Examination.*

I am of legal age, a grocer, doing business at the address given in the appended list. I do not handle tobacco products. I have never stocked and sold Beech-Nut scrap tobacco (Plaintiff's Exhibit No. 3). I was recently shown a package of this Beech-Nut scrap tobacco by a person whose name and business connection I did not then know, but whom I now know to be a representative of the Beech-Nut Packing Company, and asked whose product it was. I immediately, without

looking to see whose product it was, took it to be a product of the Beech-Nut Packing Company by reason of the name Beech-Nut and the label appearing thereon.

I was subsequently informed that this product was not a product of the Beech-Nut Packing Company.

*Cross-Examination.*

I have never bought or sold goods like the scrap tobacco package or the cigarette package referred to and having no interest therein never looked at the package to see whose product it was, and never read the wording thereon and therefore never saw the name Lorillard on them. I never bought, sold, or saw a product of the Beech-Nut Packing Company packaged or put up like Plaintiff's Exhibit No. 3, Scrap Tobacco. I have never been offered any Beech-Nut tobacco product by any Beech-Nut salesman, nor have I ever been advised by Beech-Nut tobacco salesmen that the Beech-Nut Packing Company was making tobacco products of any kind. I would never confuse either scrap tobacco or cigarettes with chewing gum or any Beech-Nut food product nor would I accept one of these products in the place of the other, as I regard these as entirely different classes or kinds of goods, and I would think that anyone who would accept a package of scrap tobacco or a package of cigarettes in the place and stead of chewing gum or any Beech-Nut food product would be crazy.

M. A. Landolf, Vernon & 63rd Streets, Chicago.

Mr. Dietz, Vernon & 63rd Streets, Chicago.

Chas. G. Voelker, Cor. S. Michigan Avenue & 61st St., Chicago.

H. A. Newman, 211 43rd Street, Chicago.

J. K. Larkin, 48 43rd Street, Chicago, C/o Roberts & Larkin.

Chris Flamburas, United Fruit Market, 3829 Broadway, Chicago.

Fred Masak, 6148 N. Clark Street, Chicago.

F. C. Dammeran, 3176 Broadway, Chicago.

Aug. Digeser, 3710 Broadway, Chicago.

W. V. Moore, Riverside, Illinois.

A. R. Owen, Riverside, Illinois.

W. W. Meyer, 1108 W. Chicago Ave., Oak Park, Ill.

Mr. Miller, 2308 N. Clark Street, Chicago.

C. H. Beese, 701 Murray Avenue, Chicago.

Mr. Kosche, 511-13 Main Street, Evanston, Ill.

M. Guttziet, 601 Dempster Street, Evanston, Ill.

Mr. Taylor, 530 Davis Street, Evanston, Ill.

G. C. Shiebe, Davis Street, Evanston, Ill.

Mrs. Scheffert, C/o Mr. Weiss, Cor. Madison & Springfield, Chicago.

J. H. Blostein, 912 N. Wells Street, Chicago.

Mr. Stowers, North Avenue, Chicago.

Geo. H. Puchner, Lake Street, Oak Park, Illinois.

Mr. Pries, C/o Aug. Leitz, 111 Oak Park Ave.

Mrs. Vogel, 57 E. Chicago Avenue, Chicago.

F. McHale, 1010 N. State Street, Chicago.

OFFIELD, POOLE, HINTON & SCOTT,  
Counsel for Beech-Nut Packing Co.

RICHARD B. CAVANAGH,  
Counsel for P. Lorillard Company.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF  
NEW JERSEY.

Beech-Nut Packing Company }  
vs. } 3056.  
P. Lorillard Company.

**Stipulation.**

It is stipulated by and between the parties through their respective counsel that if the persons whose names and addresses are appended hereto were called to testify in this case, they would each testify as follows:

*Direct Examination.*

I am of legal age, a grocer, doing business at the address given in the appended list. I do not handle tobacco of any kind and have never sold tobacco. My store is a grocery store in a residence neighborhood. I have never stocked and sold Beech-Nut scrap tobacco (Plaintiff's Exhibit No. 3).

I have, however, seen the packages of scrap tobacco, identical with the aforesaid exhibit, displayed in stores and have seen poster advertising thereof for several years. I always believed that the scrap tobacco was a product of the Beech-Nut Packing Company until I was advised to the contrary by a Beech-Nut Packing Company representative.

I have within the past several weeks seen on display packages of Beech-Nut cigarettes corresponding to Plaintiff's Exhibit No. 1 and have seen a great deal of poster advertising of these Beech-Nut cigarettes. I believed that these cigarettes were a product of the Beech-Nut Packing Company until I was advised to the con-

trary by a Beech-Nut Packing Company representative.

My reason for the aforesaid belief with respect to both the scrap tobacco and cigarettes is the name "Beech-Nut" and label on the scrap tobacco and the cigarettes.

*Cross-Examination.*

I have never bought or sold goods like the scrap tobacco package or the cigarette package referred to and having no interest therein never looked at the packages to see whose products they were and never read over the wording on the advertisements, and therefore never saw the name Lorillard's or P. Lorillard Co. on them. I never bought, sold, or saw a product of the Beech-Nut Packing Company, packaged or put up like Plaintiff's Exhibit No. 3, Scrap Tobacco, or Plaintiff's Exhibit No. 1, Cigarettes. I have never been offered any Beech-Nut tobacco product by any Beech-Nut salesman, nor have I ever been advised by Beech-Nut tobacco salesmen that the Beech-Nut Packing Company was making tobacco products of any kind. I would never confuse either scrap tobacco or cigarettes with chewing gum or any Beech-Nut food product nor would I accept one of these products in the place of the other, as I regard these as entirely different classes or kinds of goods and I would think that anyone who would accept a package of this scrap tobacco or a package of these cigarettes in the place and stead of chewing gum or any Beech-Nut food product would be crazy.

James Wilkinson, 84 Sangamon Ave., Chicago.

S. Cross, 10200 Avenue A, Chicago.

D. Lawlor, 345 East 43rd Street, Chicago.

Mrs. A. Sterner, 942 East 55th Street, Chicago.

C. W. Stenbeck, Cor. Broadway & Irving Park Blvd., Chicago.

C. E. Neumann, Broadway, Chicago.  
John Bornhoffen, Devon Market & Grocery, Devon Ave., Chicago.  
N. Weil, 3554 N. Halsted Street, Chicago.  
A. Tennebaum, 3207 Broadway, Chicago.  
M. Harris, 668 N. Clark Street, Chicago.  
C. Diamond, 2126 Clark Street, Chicago.  
J. Wilson, 3138 Broadway, Chicago.  
S. Oris, N. Clark & Elm Streets, Chicago.  
Frank Jirachek, 7212 National St., West Allis, Wisconsin.  
Mr. Kiep, 1107 Chicago Street, Joliet, Illinois.  
S. P. GerdI, 1909 Central Avenue, Evanston, Illinois.  
Mr. Cazal, 817 Davis Street, Evanston, Illinois.  
Mr. Winters, 620 Davis Street, Evanston, Illinois.  
N. Young, Kuhn Grocery, 1446 Wells St., Chicago.  
Fred Blase, 314-16 Lake Street, Oak Park, Illinois.  
Frank Katz, 866 N. State Street, Chicago.  
Chas. Norstedt, 803 N. State Street, Chicago.  
Ernest Alm, 1010 S. Michigan Ave.  
Otto Freuzen, Elliott & Stanley Ave., Berwyn, Illinois.

OFFIELD, POOLE, HINTON & SCOTT,  
Counsel for Beech-Nut Packing Co.  
RICHARD B. CAVANAGH,  
Counsel for P. Lorillard Company.

I Sarah E. Harvey, a notary public within and for the County of Cook, and State of Illinois, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of Roy B. Southern, Albert B. Lewis, Albert Levy, John E. Watson, William H. Sage, A. H. Carlson, Arthur E. Fechter, Charles O. Larson, John Sabelis, Darrell S. Boyd, M. W. Ryan and Eugene C. Sullivan, were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me, at Chicago, Illinois, beginning October 31, 1921; that each of the foregoing witnesses was by me duly sworn; that the testimony of said witnesses was taken down in shorthand by me and thereafter reduced by me to typewriting; that the opposing party hereto was represented by Richard B. Cavanagh during the taking of said testimony; that the testimony was taken at the office of Offield, Poole, Hinton & Scott, 1737 First National Bank Building, Chicago, Illinois, beginning at 1:00 P. M., October 31, 1921, and ending November 7, 1921, at 6:00 P. M.; that I am not connected by blood or marriage with either of the parties hereto, or interested directly or indirectly in the matter in controversy; and that the signature of each of the witnesses to his deposition was waived by consent of counsel.

SARAH E. HARVEY.

[SEAL.]

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT  
OF NEW JERSEY.

Beech-Nut Packing Company,	}	Equity No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,	}	
<i>Defendant.</i>		

Depositions on behalf of plaintiff, taken pursuant to notice and agreement of counsel, before Alice M. Rankin, a Notary Public in and for Cook County, State of Illinois, acting as Special Examiner, by consent of counsel, beginning on Monday, October 30, 1921, at 2 o'clock P. M., at Chicago, Cook County, Illinois.

Present: Sebastian Hinton, Esquire, representing the plaintiff; R. B. Cavanagh, Esquire, representing the defendant.

Whereupon the following proceedings were had:

WILLIAM I. THOMAS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Hinton.*

Q. 1. Please state your name, age, residence and occupation.

A. My name is William I. Thomas; I live at 5431 Kimbark; 54 years old; grocery business.

Q. 2. Where is your place of business located?

A. 931 East 47th.

Q. 3. Do you chew tobacco, Mr. Thomas?

A. Yes.

Q. 4. How long have you chewed tobacco?

A. About twenty—thirty years.



Q. 5. I show you a package of scrap tobacco, being a package of Beech-Nut scrap tobacco, Plaintiff's Exhibit No. 3 in this case. Have you ever chewed this brand of tobacco, and if so, for how long?

A. Tobacco?

Q. 6. Yes.

A. I have chewed that off and on for the last five years.

Q. 7. Prior to the spring of 1921 whose product did you think this was?

A. I supposed it was the Beech-Nut people that put out stuff such as bacon and chili sauce and all that class of stuff.

Q. 8. During the time that you have chewed this tobacco have you carried it around with you in your pockets, and taken it out when you wanted a chew?

A. Yes.

Q. 9. Do you now think that this tobacco is put out by the Beech-Nut Packing Company?

A. Do I now?

Q. 10. Yes.

A. No. Not since I have been made wise to it last spring.

Q. 11. And do you know who put you wise to it last spring?

A. Some young fellow; I don't know who he was; come into the store there one day and he said he represented the Beech-Nut people, and I told him that we handled the Beech-Nut people's goods. He says, "Do you handle Beech-Nut chewing tobacco?" I says, "No, but I use it." He says, "Do you use it?" I says, "Yes, I have been using it over"—I told him then, I believe, about four years. "Do you think we put this out?" he says. I says, "Yes. Don't you?" He says, "No, it is not our goods."

Q. 12. Have you previously seen these cigarettes which

I now show you, being Beech-Nut cigarettes, Plaintiff's Exhibit No. 1?

A. Well, I have seen that since I have had this conversation with that young man. Then I took it for granted it was that same tobacco concern that was using the Beech-Nut brand.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 13. Mr. Thomas, when was the last time you bought this Beech-Nut tobacco like Exhibit 3?

A. About three weeks ago, I think. I have got a big part of it in the drawer there yet.

X-Q. 14. But you have been buying it since you found out it was made by Lorillard Company?

A. Oh, yes.

X-Q. 15. It is good tobacco?

A. Yes, I like it.

X-Q. 16. You like it, don't you?

A. Yes.

X-Q. 17. Did you ever hear of the P. Lorillard Company?

A. Oh, yes.

X-Q. 18. They are large tobacco manufacturers, are they not?

A. Yes.

X-Q. 19. Put out a nice class of goods?

A. Yes.

X-Q. 20. You notice the name Lorillard on this package, do you not?

A. I do on this one. I have never noticed it before.

X-Q. 21. Never took a good look at it, did you, now?

A. No. All I was looking for was tobacco.

X-Q. 22. If you had noticed the name "Lorillard's," you would have connected it with the tobacco?

A. Why, evidently, yes.

X-Q. 23. Do you sell tobacco in your store?

A. No.

X-Q. 24. You sell food products?

A. We had a store down at 55th street where we sold tobacco and sold Beech-Nut. I never noticed, though; my son run the place, for I was working out, but I never noticed the maker's name.

X-Q. 25. You bought your goods from a jobber, did you?

A. Oh, yes.

X-Q. 26. Or did you buy it direct from the P. Lorillard Company?

A. No; I bought from an agent here in Chicago.

X-Q. 27. Did you buy it in a large carton?

A. In cartons, yes.

X-Q. 28. You didn't notice whether the name "Lorillard" was on the carton or not?

A. I never noticed; no, sir.

X-Q. 29. If you had seen that name you would have known it was the tobacco company, would you not?

A. I think I would; yes, sir.

X-Q. 30. You handle Beech-Nut Packing Company products in your store where you work now, do you not?

A. Yes. We handle a few candies, and, oh, several items there; we handle Beech-Nut peanut butter.

X-Q. 31. Different Beech-Nut items?

A. Yes.

X-Q. 32. Do you do any buying for this store?

A. No, sir.

X-Q. 33. If you went into a store and wanted a package of scrap tobacco to chew, would you be deceived or fooled into taking chewing gum for scrap tobacco, if you wanted scrap tobacco?

A. Oh, no.

X-Q. 34. You would consider it an entirely different class of goods, would you not?

A. Why, yes.

Mr. Cavanagh: That is all.

Deposition closed.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

A. V. BOBB, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Hinton.*

Q. 1. Please state your name, age, residence and occupation.

A. 5536 Kimbark; 26; butcher.

Q. 2. Where is your place of business, Mr. Bobb?

A. 1362 East 47th.

Q. 3. Do you run the meat market?

A. Yes, sir.

Q. 4. At your place of business?

A. Yes, sir.

Q. 5. Do you chew tobacco, Mr. Bobb?

A. Yes, sir.

Q. 6. What brand have you chewed for the last four or five years, do you remember?

A. Why, Beech-Nut was one of them, and Golden Twins, Climax.

Q. 7. Is the Beech-Nut that you refer to the Beech-Nut scrap tobacco which I now show you, and which is in this case as Plaintiff's Exhibit No. 3; is that the Beech-Nut scrap?

A. Yes, sir.

Q. 8. How often, do you suppose, in the last five years

you have purchased this Beech-Nut scrap tobacco; I mean, how many times a week?

A. Now, I would not say whether it is four years or not—five years, but it is pretty close to it; about four years that I can remember; the year before I went into the army; around four years.

Q. 9. I want an idea of how frequently you would purchase this tobacco?

A. About once a week, maybe twice a week.

Q. 10. And by whom did you believe that this product was put out?

A. By the Beech-Nut Packing Company, Canajoharie, New York.

Q. 11. And how long did you continue to believe that?

A. Up until about—well, three months ago.

Q. 12. And how did you find out that that was not true?

A. By one of the salesmen, one of the Beech-Nut salesmen; he come into the store and I asked him about it; I asked him who puts up the Beech-Nut cigarettes, and he told me Lorillard's. I said, "I thought you was putting it out," and he said, no he didn't.

Q. 13. I show you a package of cigarettes, being Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes. Have you seen these cigarettes before?

A. Yes, sir.

Q. 14. When, and how was your attention first directed to these cigarettes, do you remember?

A. Why, yes, I was out at Jones' pharmacy, 63rd street, and standing at the counter there, and I says, "Beech-Nut cigarettes," and he says, "Yes, I got some Beech-Nut cigarettes here, put out by the Beech-Nut Company." I says, "It isn't the same one that makes bacon?" He says, "Yes."

Q. 15. And did he mention any other product that was made by these same people?

A. Why, chewing tobacco; that was what I was after when I was in there.

Q. 16. Do I understand he told you the chewing tobacco was made by the same people?

A. By the Beech-Nut Packing Company.

Q. 17. What made you think that this scrap tobacco was a product of the Beech-Nut Packing Company?

A. It had the two beech-nuts on there, the same as the bacon, and it was in an oval shape, the same as the bacon does, and red letters and blue letters, just exactly the same as it is on the bacon. I never thought of looking at what was on the package.

Q. 18. When did you first see the name of the manufacturer on this package, do you remember?

A. About three months ago, when I had a package and looked at it, and it said "Lorillard's" across the top.

Q. 19. On the back of the scrap?

A. Yes.

Q. 20. This was after you were advised?

A. After I was told it was not a Beech-Nut product. That is the reason I have been chewing it all the time, because I know the Beech-Nut bacon is good, and that the tobacco ought to be the same, and I liked the taste of it very much, being in the business I am in.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 21. Are you still buying and chewing this Beech-Nut scrap tobacco of Lorillard's?

A. Yes, I bought a package yesterday.

X-Q. 22. So you have been buying it steadily since you found out it was Lorillard's?

A. Yes, I have been using it all the time.

X-Q. 23. You have heard of the P. Lorillard Company, have you not?

A. Yes, I have heard of them; yes.

X-Q. 24. You know they are large tobacco manufacturers?

A. I know they are tobacco manufacturers. That is all I know about them

X-Q. 25. And this is a good tobacco, is it not?

A. Yes.

X-Q. 26. And it does not make any difference to you whether it is made by the Lorillard Company or the Beech-Nut Packing Company, so far as your use of it is concerned?

A. Yes; I like the taste of it.

X-Q. 27. That is the reason you continue to use it?

A. That is the reason I use it.

X-Q. 28. Do you ever use their cigarettes?

A. Never smoke cigarettes.

X-Q. 29. I understand you have been chewing this tobacco for five years?

A. About four years; I would not say five.

X-Q. 30. About four years?

A. About four years.

X-Q. 31. And you had never taken the trouble to look to see whose name was on there?

A. Never looked at the name; just stuck it in my pocket and when I wanted a chew just took a handful out.

X-Q. 32. You spoke of this label being something like the bacon label.

A. Like they have on the bacon; yes.

X-Q. 33. Have you got one of those bacon labels?

A. Yes.

X-Q. 34. Could you get one a minute, please?

A. Sure.

(Witness produces label.)

Mr. Cavanagh: Mark this for identification as "Defendant's Cross-Exhibit No. 8."

(The paper was so marked.)

X-Q. 35. Now, this oval on the bacon label which you have produced is in the nature of a wide red band, is it not?

A. Yes.

X-Q. 36. That is a blue band around the Beech-Nut scrap tobacco?

A. Yes.

X-Q. 37. And that red label has printing on it, "Beech-Nut Brand," and the word "Bacon," has it not?

A. Yes.

X-Q. 38. And there is no printing on that blue band of the oval of the Beech-Nut tobacco, is there?

A. No.

X-Q. 39. And the Beech-Nut has a single beech-nut on green leaves, has it not?

A. Yes.

X-Q. 40. And you have two red beech-nuts on the scrap tobacco?

A. Yes.

X-Q. 41. And this scrap tobacco has large, prominent red radiating lines running from the oval, has it not, on the face of it?

A. Yes.

X-Q. 42. So the two labels are not alike, are they?

A. Well, they are shaped alike.

X-Q. 43. That is, their ovals?

A. Their ovals, yes.

X-Q. 44. Now, if you went into a store and you wanted some scrap tobacco, being as you chew, and a man handed you a package of chewing gum for scrap tobacco, could you be fooled into taking that chewing gum in the place of scrap tobacco?



A. No, sir.

X-Q. 45. You would think a man was crazy that would, wouldn't you?

A. I would think so.

X-Q. 46. That is because they are an entirely different class of goods, is it not?

A. Absolutely.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

JAMES F. BALLARD, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Hinton.*

Q. 1. Mr. Ballard, please state your name, age, residence and occupation.

A. James F. Ballard; 5213 Harper avenue; retail meat business.

Q. 2. Age?

A. Twenty-eight.

Q. 3. Where is your place of business?

A. 1516 East 53rd.

Q. 4. I show you a package of cigarettes, being a package of Beech-Nut cigarettes in evidence in this case, as Plaintiff's Exhibit No. 1. Have you ever seen those cigarettes before?

A. No, I never have.

Q. 5. I am not referring to this particular package, but to another package like that.

A. Oh, yes, another package like that; certainly.

Q. 6. When did you first hear about these cigarettes?

A. From A. L. Christensen.

Q. 7. What did he say?

A. Told me the Beech-Nut Company was putting out a product in tobacco and cigarettes.

Q. 8. Who is Mr. Christensen?

A. He is a man in my employ.

Q. 9. Did you subsequently obtain and smoke any of these cigarettes?

A. I did.

Q. 10. What made you want to get some of those cigarettes?

A. Just because I handled some of the Beech-Nut goods, more than anything.

Q. 11. What did you expect the cigarettes would be?

A. I thought they would be an extra fine quality.

Q. 12. Was your expectation satisfied when you obtained and smoked those cigarettes?

A. I did not think they were. Of course, I am not a cigarette smoker. See?

Q. 13. From the time that Mr. Christensen spoke to you about the cigarettes, how long did you believe that they were a Beech-Nut product?

A. All the time.

Q. 14. Until when?

A. Until I was convinced they was not.

Q. 15. Who convinced you?

A. A representative of the Beech-Nut Packing Company. I would have still firmly believed so.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 16. Do you chew, Mr. Ballard?

A. No, I do not, sir.

X-Q. 17. Do you smoke?

A. Not cigarettes.

X-Q. 18. You do not smoke cigarettes?

A. Nothing but cigars.

X-Q. 19. So it is very seldom you smoke cigarettes?

A. Very seldom. I think that was my first cigarettes.

X-Q. 20. Did you ever hear of the P. Lorillard Company?

A. Yes, I have heard of it.

X-Q. 21. They are a large tobacco company, are they not?

A. Yes, sir.

X-Q. 22. If you had seen that name, P. Lorillard Company, on that package of cigarettes, you would have thought it was one of their products?

A. Not necessarily.

X-Q. 23. Wouldn't that connect them in your mind?

A. Not necessarily.

X-Q. 24. Who would you have thought made it?

A. Beech-Nut Packing Company.

X-Q. 25. Is Beech-Nut Packing Company anywhere on that package?

A. No.

X-Q. 26. You do find it on all of their other products?

A. This packing company? There is no name on the Beech-Nut Packing Company products; no.

X-Q. 27. I mean there is a name—for instance, to be specific, I show you a label in this case, known as Defendant's Cross-Exhibit No. 8, of the Beech-Nut brand of bacon; do you not find the name "Beech-Nut Packing Company, Canajoharie, New York," on it?

A. Yes, sir, exactly.

X-Q. 28. That label is on all their goods?

A. Yes.

X-Q. 29. With that name Beech-Nut Packing Company on there?

A. Exactly.

X-Q. 30. You do not find the name "Beech-Nut Packing Company" on this package of cigarettes?

A. No.

X-Q. 31. But you do find the name "P. Lorillard Company"?

A. Exactly.

X-Q. 32. And you know the P. Lorillard Company are tobacco people?

A. Yes, I know of them.

X-Q. 33. You have heard of them?

A. I have heard of them.

X-Q. 34. If you went into a store and you wanted a food product or chewing gum, could you be fooled into taking a package of cigarettes for chewing gum?

A. Could I be fooled into taking the package?

X-Q. 35. Yes.

A. No. But I could if I wanted cigarettes, not if I wanted chewing gum.

X-Q. 36. Perhaps you do not understand. Supposing you wanted cigarettes.

A. That is the idea.

X-Q. 37. Could you be fooled into taking gum for the cigarettes?

A. Could I be fooled into taking gum for cigarettes? No.

X-Q. 38. That is because they are an entirely different class of goods?

A. Yes; sure; exactly.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

ALEX B. CHRISTENSEN, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Hinton.*

Q. 1. Please state your name, age, residence and occupation.

A. My name is Alex B. Christensen; butcher; 1623 East 55th Street, that is my residence. I am fifty-four years old.

Q. 2. Where is your place of business, Mr. Christensen?

A. Well, right here, 1516 East 53rd.

Q. 3. By whom are you employed.

A. James Ballard.

Q. 4. I show you a package of cigarettes in evidence in this case as Plaintiff's Exhibit No. 1. Have you ever seen similar packages of cigarettes before?

A. Similar packages?

Q. 5. Yes.

A. Yes, sir.

Q. 6. When did you first see these cigarettes?

A. When did I first see the cigarettes, close, do you mean—had it in my hand?

Q. 7. Well, no; I mean, when did you first see them?

A. First time I seen them, in the United Cigars Company.

Q. 8. When was the first time you bought them?

A. In the store here.

Q. 9. Now, when you saw them in the United Cigars Stores, did you have any conversation with the clerk about them?

A. I did, sir.

Q. 10. Do you remember what he told you?

A. Well, I asked him, I says, "Beech-Nut put out cigarettes?" He says, "Yes." He says, "They are also putting out scrap tobacco," and he says, "When the people ask me for a package of Beech-Nut, I don't know whether to give them gum, cigarettes or tobacco."

Q. 11. Did you believe that this was a product of the Beech-Nut Packing Company?

A. I certainly did.

Q. 12. How long did you continue to believe that?

A. Why, until a representative of the Beech-Nut Packing Company come in here and told us different.

Q. 13. Did you say anything to Mr. Ballard about this cigarette?

A. I did. I come in and says, "Beech-Nut is putting out cigarettes as well as tobacco, Beech-Nut Packing Company."

Q. 14. Did you ever see Mr. Ballard with a package of these Beech-Nut cigarettes?

A. I did, yes, sir, previous—after we spoke about the Beech-Nut Packing Company.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 15. Do you chew?

A. No.

X-Q. 16. Do you smoke?

A. Yes.

X-Q. 17. Do you smoke cigarettes?

A. Yes.

X-Q. 18. Did you ever buy a package of this scrap tobacco?

A. No, sir.

X-Q. 19. Did you ever buy a package of these cigarettes?

A. No, sir.

X-Q. 20. Did you ever take them in your hand and examine them?

A. Yes, sir.

X-Q. 21. Did you ever hear of the P. Lorillard Company, tobacco manufacturers?

A. Yes, sir.

X-Q. 22. P. Lorillard Company's name is on that package, isn't it?

A. Yes, sir.

X-Q. 23. You do not find Beech-Nut Packing Company on there, do you?

A. No, sir.

X-Q. 24. Who was this man who told you that the Beech-Nut people were putting out this cigarette?

A. I don't know what his name is, clerk over here in the United Cigar Company.

X-Q. 25. You don't know what his name is?

A. No, sir.

X-Q. 26. Where is this United Cigar Company?

A. Right here in the Holland Hotel.

X-Q. 27. Holland Hotel, Chicago?

A. Yes, sir.

X-Q. 28. What corner, what street?

A. Fifty-third and Lake Park Avenue.

X-Q. 29. Is that clerk still working there?

A. Yes, sir.

X-Q. 30. If you went into a store and wanted a package of cigarettes, could you be fooled into taking chewing gum in place of cigarettes?

A. Certainly not. Chewing gum and cigarettes are two different articles.

X-Q. 31. Entirely different class of goods, are they not?

A. Yes, certainly. One you chew and the other you smoke.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

DANIEL HUTTNER, called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Hinton.*

Q. 1. Please state your name, age, residence and occupation.

A. Daniel Huttner; 5427 Kimbark Avenue, Chicago, Illinois; occupation, butcher.

Q. 2. Your age?

A. Thirty-six.

Q. 3. Where is your place of business, Mr. Huttner?

A. 1419 Fifty-fifth.

Q. 4. I show you a package of cigarettes in this case as Plaintiff's Exhibit No. 1, being a package of Beech-Nut cigarettes. Have you ever before seen a package of cigarettes like that?

A. I have.

Q. 5. When and where did you see them, do you remember?

A. Displayed in a United Cigar Store, 55th and Lake Park Avenue.

Q. 6. And whose product did you take them to be when you saw them?

A. The Beech-Nut Packing Company.

Q. 7. Did you purchase a package?

A. I did.



Q. 8. Why did you buy the package of cigarettes?

A. I am familiar with the goods of the Beech-Nut Packing Company and I purchased a package to try them out.

Q. 9. Were you satisfied with the cigarettes?

A. Well, I haven't bought any since.

Q. 10. I show you a package of scrap tobacco, being Plaintiff's Exhibit No. 3 in this case, Beech-Nut Scrap Tobacco. When you first saw that package, whose product did you take it to be?

A. Beech-Nut Packing Company.

Q. 11. What made you take it to be the product of the Beech-Nut Packing Company?

A. It says "Beech-Nut" right on the package.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 12. Do you sell tobacco?

A. I do not.

X-Q. 13. Don't handle any tobacco product at all?

A. No.

X-Q. 14. Do you chew?

A. Do not chew; no.

X-Q. 15. Do you smoke cigarettes?

A. I do.

X-Q. 16. You know that different people have different tastes, as far as brands of cigarettes go?

A. I do.

X-Q. 17. What some might like in one some other people would not want?

A. Exactly.

X-Q. 18. And that is the same in most products, isn't it?

A. Well, yes, just a matter of taste.

X-Q. 19. Matter of taste. Did you ever hear of the P. Lorillard tobacco people?

A. No, I have not; no.

X-Q. 20. When you bought that package of cigarettes, you did not take the trouble to notice that name, P. Lorillard Company, on it, did you?

A. No, I did not.

X-Q. 21. If you went into a store and you wanted to buy a package of chewing gum, could you be fooled into taking cigarettes for chewing gum?

A. If I was buying an article that was worth any money at all I maybe would look into it further, more than twenty cents.

X-Q. 22. But what I am asking you is this: Supposing you wanted some cigarettes and a man passed you over chewing gum over the counter when you asked for cigarettes, could you be fooled into taking that chewing gum?

A. Not at all.

X-Q. 23. Entirely different class of goods?

A. Exactly. I suppose if I wanted cigarettes I would ask for cigarettes and not chewing gum.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

Whereupon an adjournment was taken until Tuesday, November 1, 1921, at 2:30 P. M.

CHICAGO, November 1, 1921.

Parties met pursuant to adjournment. Present: counsel as before.

WILLIAM OLIVER PARK, called as a witness on behalf of of the plaintiff, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Hinton.*

Q. 1. Please state your name, age, residence and occupation.

A. My name is William Oliver Park; my residence is 2821 Warren avenue; I am 48 years old; my occupation is delicatessen or grocery.

Q. 2. Where is your place of business?

A. 3447 West Madison.

Q. 3. How long have you had this place of business?

A. Since last February.

Q. 4. What were you doing before that?

A. With Sprague-Warner. Well, prior— you mean immediately prior to that? I was with the Hecker people, of Cleveland.

Q. 5. And what line was that?

A. That was in the railroad business.

Q. 6. And before you were with the Hecker people?

A. Sprague-Warner.

Q. 7. What is Sprague-Warner's business?

A. Wholesale grocery.

Q. 8. Were you salesman for Sprague-Warner?

A. No, I had the tea room.

Q. 9. I show you a package of Beech-Nut scrap tobacco, in this case as Plaintiff's Exhibit No. 3, being a package of Beech-Nut scrap. Do you sell this product in this store?

A. Yes, sir.

Q. 10. How long have you sold it here?

A. Ever since I have been in.

Q. 11. Do you know who makes this product?

A. No, I do not; I have never paid any attention to it.

Q. 12. Who did you think put out this product prior to August, 1921?

A. I thought Lorillard put it out, I guess. At least the salesman told me Lorillard put it out.

Q. 13. Did the salesman tell you that?

A. I don't know that. I thought the Beech-Nut people, naturally. It was called Beech-Nut scrap. We don't notice nothing except the mark. I never delved into it.

Q. 14. And when did this salesman tell you Lorillard put it out, do you remember when that was?

A. No, I don't remember exactly; must have been along in the spring sometime.

Q. 15. Have you ever seen Beech-Nut cigarettes?

A. Only the package you showed me; that is all.

Q. 16. You never handled them, Beech-Nut cigarettes?

A. No, we don't handle any cigarettes.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 17. I notice the name "Lorillard's" on that package.

A. Yes.

X-Q. 18. You know the Lorillard Company?

A. I know of them, yes.

X-Q. 19. Tobacco manufacturers?

A. They are.

X-Q. 20. That would indicate to you that was a Lorillard product, would it not?

A. Yes, that is naturally what that would indicate. But we sell so little, I don't pay any attention. Some people come in for Beech-Nut, I never look at it, just give it to them. We don't handle tobacco, you know.

X-Q. 21. Do you handle any of the Beech-Nut Packing Company's products here?

A. Yes, we handle Beech-Nut gum. We have handled Beech-Nut peanut butter.

X-Q. 22. You never bought any tobacco from the Beech-Nut Company, did you?

A. No, never.

X-Q. 23. Do you buy that product from Lorillard or from the jobber?

A. No; tobacco jobber out here.

X-Q. 24. If you went into a store and you wanted some Beech-Nut chewing gum, you couldn't be fooled into taking scrap tobacco when you wanted gum, could you?

A. Oh, no, not if I wanted gum.

X-Q. 25. They are an entirely different class of goods?

A. I imagine so.

X-Q. 26. You could never be fooled on that?

A. No, sir.

X-Q. 27. You wouldn't sell a person tobacco for gum?

A. No.

Mr. Cavanagh: That is all.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 28. About how much of that tobacco do you sell here, Mr. Park, could you tell me?

A. Oh, I suppose, maybe a dozen a week would be a fair estimate of the Beech-Nut scrap.

Mr. Hinton: That is all.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 29. That is a mighty good selling tobacco?

A. For a place like this, don't amount to anything; a dozen a week don't amount to anything.

R-X Q. 30. How many people work in this store?

A. Only myself.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

F. J. LATZEL, called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Hinton.*

Q. 1. Will you please state your name, age, residence and occupation, Mr. Latzel?

A. My name is F. J. Latzel; I run a delicatessen store at 1122½ Lake street, Oak Park; and I live in the same premises.

Q. 2. I show you a package of scrap tobacco, being Plaintiff's Exhibit No. 3, Beech-Nut Scrap Tobacco. Do you sell this scrap tobacco in your store, Mr. Latzel?

A. Sure.

Q. 3. How long have you sold it, do you remember?

A. About a month now.

Q. 4. When you first stocked and sold this scrap tobacco, by whom did you think that it was put out?

A. By the Beech-Nut Company.

Q. 5. How long did you continue to believe that this scrap tobacco was the product of the Beech-Nut Company?

A. Well, I don't know how long I believed it. Just when you told me, you know.

Q. 6. And how long ago was it when I told you?

A. About a couple of weeks ago; maybe a week ago; I don't know.

Q. 7. Have you personally handed out this product to

customers over the counter since it has been in this store here?

A. No. People want it, you know, and I give it to them, you know; that is all. I got the same thing here. I got a customer for it. You know how it is in a business.

Q. 8. Have you spoken to any jobber salesman of tobacco about this thing recently?

A. Well, except today.

Q. 9. And what happened today?

A. Well, he told me, I asked a fellow, another jobber what sells me cigars, and I asked him, "You got that tobacco?" He says, "Yes, I sell him." And I say, "You know that is maybe all kinds of trouble?" Why, he says, this is the case, you know, he says, "I don't know," just this way, and he says that for years now.

Q. 10. What did he say about who made the product?

A. He say nothing about this; nothing. I told him after who make it, you know. He says the name on it, he says, "I was sure that they sell that, that the Beech-Nut Company make that."

Q. 11. Beech-Nut Company made that?

A. Yes. Like I.

Q. 12. In other words, he was under the same belief that you were?

Mr. Cavanagh: Objected to as leading, and objected to as a conclusion that there is no foundation for, mere hearsay. That is a ridiculous question.

Mr. Hinton: This testimony is offered to show that tobacco jobbers will tell tobacco retailers in certain instances, at least, that the scrap is a Beech-Nut product.

A. How it looks, that people who know, they think it is from you, them dealers, you know, or them fellows.

Q. 13. Now, who was this jobber man, do you know his name?

A. What sold me the stuff?

Q. 14. No, the man with whom you had the conversation today.

A. Reimschreiber.

Q. 15. Mr. Latzel, was it Mr. Reimschreiber himself or one of his men?

A. I don't know; I can't tell you. Maybe. Maybe not. I can't tell you that.

Q. 16. Mr. Latzel, I wish you would try and tell me, if you know, slowly, what the conversation was between you and the jobber salesman who came in today, about this Beech-Nut scrap tobacco.

A. I told you already. I told you already again. I asked him about the tobacco. I asked him, "You sell that tobacco?" He says yes, and I told him maybe there is all kinds of trouble about this, the Beech-Nut. "Well," he says, "that is the first thing I hear." He was just the same mind as I, that you people make that. See? That is all. After this we look on that name, you know. I had a package out the other day.

Mr. Cavanagh: That part of the examination as to what the jobber or salesman might have thought is objected to on the ground this witness cannot testify as to that.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 17. Do you know of the P. Lorillard Company, the tobacco people?

A. I do not know him at all.

X-Q. 18. Did you ever hear of them?

A. This is the first thing I hear, a week ago, when we look on that package.

X-Q. 19. You see the Lorillard Company name on it?

A. I see it now. I see it last week; never before.



X-Q. 20. Never took the trouble to look for it?

A. Never looked at it.

X-Q. 21. It doesn't make any difference to you, as long as you sell the tobacco, whose name is on it, does it?

A. If they want tobacco and Beech-Nut stuff is good, maybe I sell it.

X-Q. 22. You still sell it?

A. I pay for it. I can't throw it away.

X-Q. 23. It is a good seller, then?

A. Yes, it is a good seller.

X-Q. 24. And you did not know that the Lorillard Company were large tobacco manufacturers?

A. I did not know. I never heard that name before, except when we looked for it when the gentleman was here about a week ago, my dear man.

X-Q. 25. Do you sell Beech-Nut chewing gum?

A. Oh, yes.

X-Q. 26. If a man came in and wanted some chewing gum, you wouldn't sell him Beech-Nut scrap tobacco when he asked you for chewing gum, would you?

A. Do you think I am crazy? Such a question.

X-Q. 27. Then they are two entirely different classes of goods, are they not?

A. Tobacco is tobacco and chewing gum is chewing gum. Don't you think so?

X-Q. 28. You wouldn't mix up one with the other?

A. No.

X-Q. 29. Now, this salesman, this cigar salesman you were talking to, did you buy your Beech-Nut scrap tobacco, like this package of Lorillard tobacco scrap, did you buy it from that salesman?

A. I bought it from Neimann.

X-Q. 30. But not from the man you were talking to?

A. He is a different man. I have two men that bring me cigars.

X-Q. 31. You say you never had anyone come in to sell you this tobacco and claim it was made by the Beech-Nut Packing Company?

A. No.

X-Q. 32. They never misled you on that?

A. When I had the talk about a week ago, I have had cigars before and tobacco before, when my tobacco man came he says, "You need some tobacco," he says, "Beech-Nut?" "Sure; all right; that is a good thing; give me a dozen packages." That is all.

X-Q. 33. You did not buy that package from the Beech-Nut Packing Company man, did you; it was from a cigar jobber, was it not?

A. From a fellow named Neimann; same jobber for years.

X-Q. 34. And he didn't say to you it was made by the Beech-Nut Packing Company, did he?

A. No; we don't have no conversation about it. I don't know anything about it except when Beech-Nut come and he tell me, about three weeks ago and last week.

X-Q. 35. Was this man that you did talk to today about it around again, the man who sold you the tobacco?

A. No.

X-Q. 36. Had no connection with that man?

A. No; absolutely not.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

FRED KNOOP, called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Hinton.*

Q. 1. Will you please state your name, age, residence and occupation?

A. My name is Fred Knoop; I am 60 years old; grocery and market; I live at 1148 Holly court, Oak Park, Illinois.

Q. 2. And where is your place of business, Mr. Knoop?

A. 1108 Lake street.

Q. 3. How long have you been in the grocery business?

A. Twenty-nine years.

Q. 4. I show you a package of scrap tobacco, being Plaintiff's Exhibit No. 3, Beech-Nut Scrap Tobacco. When you first saw that package, whose product did you take it to be?

A. Beech-Nut.

Q. 5. What label is that that appears on the package in the form of an oval on the front?

A. The same thing as we have on peanut butter and jellies, and of different things, all different articles that we sell in the store that is made by the Beech-Nut Packing Company.

Q. 6. How long, to your knowledge, has the Beech-Nut Packing Company used that label?

A. Well, ever since I have been in business.

Q. 7. Can you, Mr. Knoop, recite a full list of all the products the Beech-Nut Packing Company makes?

A. No, I could not, because I have handled some years more and some years less, but we have handled all their jams and jellies and the peanut butters, and we handle their bacon, and, oh, different things; handle their macaroni and all that. On every one of them you see that same label.

Q. 8. How many clerks do you employ in your place of business, Mr. Knoop?

A. Well, I only have four now, two of my boys and two outsiders.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 9. Did you ever hear of the P. Lorillard Company, Mr. Knoop?

A. No, sir; I do not know who they are, because—

X-Q. 10. Do you handle tobacco?

A. No, sir.

X-Q. 11. Don't sell tobacco at all?

A. No; no, don't use it myself.

X-Q. 12. Don't chew or smoke?

A. No, nor drink; none of the three.

X-Q. 13. You never bought a package of this tobacco?

A. Thirty-five years ago I bought tobacco; couldn't tell you what it was.

X-Q. 14. You never bought a package of this that you know of?

A. No, sir.

X-Q. 15. Do you handle Beech-Nut chewing gum?

A. Yes.

X-Q. 16. And you handle Beech-Nut bacon?

A. Yes.

X-Q. 17. I show you a label, which is in this case Defendant's Cross-Exhibit No. 8, of the Beech-Nut brand of bacon. Is that the label you say is the Beech-Nut Packing Company?

A. Yes.

X-Q. 18. That label is on all their goods?

A. Yes, that I handle.

X-Q. 19. That label has a wide red band on it, with some printing of words in it, has it not?

A. Yes.

X-Q. 20. And it has a single beech-nut in the center, on three green leaves?

A. Yes.

X-Q. 21. Now, on this label here there is not, on Beech-Nut chewing tobacco, there is no wide red band on it, is there?

A. No.

X-Q. 22. There is no printing on the band itself, is there?

A. It has an oval around there, about the same, and says "Beech-Nut."

X-Q. 23. But you know ovals are quite common on lots of goods you sell, that is, they use an oval on the labels like Veri-Best?

A. Yes, that is about the one thing, I think.

X-Q. 24. How about Armour's stuff?

A. Only one is Armour's.

X-Q. 25. So these two labels are not alike, are they?

A. No, they are not printed alike.

X-Q. 26. And you never knew of any other Beech-Nut product with a label having the wide radiating bands, did you?

A. No.

X-Q. 27. You would not confuse tobacco with chewing gums or food products so that you would take chewing gum when you wanted a chewing tobacco, would you?

A. No, not me.

X-Q. 28. They are an entirely different class of goods, are they not?

A. Yes.

X-Q. 29. You never saw Beech-Nut Packing Company's product with this Beech-Nut label on it that was put up like a package of tobacco, did you?

A. No.

X-Q. 30. Like this?

A. No. The only thing, if I had seen that, I would have thought it was put up by the Beech-Nut people, because I don't know anybody else that put up Beech-Nut stuff; that would be the only thing.

X-Q. 31. On this package you do not find any of the Beech-Nut Packing Company's name on it anywhere, do you?

A. No. No.

X-Q. 32. But you find Lorillard's name, do you not?

A. Yes; on top there.

Mr. Cavanagh: That is all.

Mr. Hinton: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

*State of Illinois, County of Cook, ss.*

I, Alice M. Rankin, a Notary Public within and for the County of Cook and State of Illinois, duly commissioned and qualified and authorized to administer oaths, and to take and certify depositions, do hereby certify that in the equity cause depending in the District Court of the United States, for the District of New Jersey, wherein Beech-Nut Packing Company is plaintiff and P. Lorillard Company is defendant, I was attended at Chicago, Illinois, beginning on the 30th day of October, 1921, by counsel for the respective parties, as appears above, and by William I. Thomas, A. V. Bobb, James F. Ballard, Alex B. Christensen, Daniel Huttner, William Oliver Park, F. J. Latzel and Fred Knoop, the witnesses named in the foregoing depositions; that said witnesses, being of sound mind and lawful age, were by me duly cautioned and sworn to testify to the truth, the whole truth, and

nothing but the truth in said cause, and thereupon they testified as appears in the foregoing depositions, and that counsel for the respective parties in each case waived the signature of the witness to his deposition; that said depositions were taken down stenographically by me in the presence of witnesses, and from the statements of said witnesses, and at the time set forth, and that all was done in the presence of counsel for both parties.

I further certify that I am neither of counsel nor attorney to either of the parties to said suit, nor interested in the event of said cause, and that it being impractical for me to deliver said depositions with my own hand, I have retained the same for the purpose of being sealed up and directed and speedily and safely transmitted to the said court for which they were taken.

Witness my hand and seal as such Notary Public at Chicago, Illinois, on this 8th day of November, 1921.

ALICE M. RANKIN,  
Notary Public.

[SEAL.]

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,		
<i>Defendant.</i>		

Depositions taken in behalf of plaintiff, before Henry F. Weller, a Notary Public and Court Reporter, acting as Special Examiner, by consent of counsel, pursuant to notice and by agreement of counsel, at Room 312 Wisconsin Hotel, Milwaukee, Wisconsin, beginning Friday, November 4, 1921, at 11 o'clock A. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

MRS. AMELIA PETERSEN, a witness produced in behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name?

A. Mrs. Amelia Petersen.

Q. 2. Residence and occupation?

A. I live at 421 North Eighth, Manitowoc, Wisconsin; we have a grocery store.

Q. 3. Of course you are of legal age?

A. Yes.

Q. 4. Do you sell tobacco products in that store of yours, Mrs. Petersen?

A. We do, yes.



Q. 5. Who is the proprietor of the store?

A. Petersen Brothers.

Q. 6. And are you the wife of one of those brothers?

A. I am.

Q. 7. Do you yourself work in the store?

A. I do at times, yes.

Q. 8. I show you a package of Beech-Nut scrap tobacco, which is in this case as "Plaintiff's Exhibit No. 3." Have you sold this scrap tobacco in your store?

A. Yes, we have.

Q. 9. How long have you had it there, Mrs. Petersen?

A. Oh, I should think about a year or more, about a year.

Q. 10. Up to within very recently whose product did you think that was?

A. The Beech-Nut Packing concern.

Q. 11. Now, I show you some Beech-Nut cigarettes. Have you seen these cigarettes?

A. I have never seen them, no.

Q. 12. You never examined a package of these cigarettes?

A. No, I have not.

Q. 13. Have you ever heard about these cigarettes?

A. I have heard about them, yes.

Q. 14. When and where did you first hear about them?

A. Well, that morning when that man was in our store trying to sell them.

Q. 15. Now, how long ago was that?

A. I think about three weeks ago.

Q. 16. Do you remember what this man said when he tried to sell these cigarettes?

A. Well, he said they were branching, that the Beech-Nut Packing Company were branching off into tobacco and cigarettes, that is what he told us.

Q. 17. To whom did he make that statement?

A. To my brother.

By Mr. Cavanagh: All that testimony is objected to as merely hearsay.

By Mr. Hinton: Q. 18. Were you present at the time?

A. I was.

Q. 19. Did you hear it?

A. I heard it.

Q. 20. Did you talk with this man about any Beech-Nut product besides cigarettes?

A. We spoke about the peanut butter, and he said they were branching off into tobacco and cigarettes.

Q. 21. Did this man say anything about what territory he had been traveling in, that you heard?

A. No, I didn't pay any attention to that; there was more said, but I couldn't remember.

Q. 22. Did you just talk about the peanut butter to him?

A. Yes, spoke about the peanut butter, and he said it was the same.

Q. 23. When he left the store, who did you believe was putting out the Beech-Nut cigarettes?

A. We always thought it was the Packing Company putting out the tobacco and the cigarettes. In fact, we knew of no other company.

Q. 24. How long was this conversation, Mrs. Petersen? Do you remember approximately about how many minutes?

A. Oh, about fifteen minutes, I should think, or longer.

Q. 25. You were talking to that man about fifteen minutes?

A. Yes.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 26. Do you sell any products of the Beech-Nut Packing Company in that store?

A. Yes.

Q. 27. What do you sell?

A. Oh, we got gum and baked beans and peanut butter and macaroni.

X-Q. 28. Then you have a general line of the products of the Beech-Nut Packing Company?

A. We have a general line, yes.

X-Q. 29. From whom do you buy goods?

A. That man over there, I think, was there last (indicating).

X-Q. 30. What is his name?

A. I don't know that, I never inquired.

Mr. Cavanagh: I will ask the gentleman his name on the record.

Mr. Wesling: O. M. Wesling.

Mr. Cavanagh: X-Q. 31. You refer to the gentleman who said his name was Mr. Wesling?

A. Yes, sir, the regular Beech-Nut man.

X-Q. 32. How long have you been buying products from Mr. Wesling for your store?

A. That I don't know either.

X-Q. 33. Well, approximately. You need not be exact, one month or a year, or what?

A. Oh, we have had it at least a year, if not more.

X-Q. 34. That Mr. Wesling has been coming to the store?

A. I don't even know if that is the same man always comes, but I noticed the one comes lately.

X-Q. 35. But you have bought stuff from Mr. Wesling?

A. Yes, I have bought stuff from Mr. Wesling.

X-Q. 36. And you know the other Beech-Nut man by appearance, don't you?

A. The one sells this tobacco?

X-Q. 37. No, the one you bought your food products from.

A. Yes.

X-Q. 38. Now, this man you had the conversation with about tobacco, that I understood you to say said that the cigarettes were made by the Beech-Nut Packing Company, had you ever seen him in the store before?

A. I had never seen him before, no.

X-Q. 39. And he wasn't the regular Beech-Nut man, was he?

A. No, he wasn't the regular Beech-Nut man.

X-Q. 40. And you had never bought goods—any Beech-Nut goods from anybody else except the regular Beech-Nut man, had you?

A. No.

X-Q. 41. How often would that Beech-Nut man come around to your place?

A. Well, I don't know how often he comes around.

X-Q. 42. Well, approximately?

A. Every five or six weeks.

X-Q. 43. Now, who was this man that came in and represented himself, and had this conversation about the Beech-Nut cigarettes?

A. I don't know his name at all.

X-Q. 44. Do you know who he represented?

A. He said he was selling Beech-Nut tobacco and cigarettes.

X-Q. 45. Do you know what concern he was from?

A. No, I don't know that either, but he let us believe he was with the Beech-Nut concern.

X-Q. 46. And didn't you ask him his name, for his card?

A. No, I didn't.

X-Q. 47. You knew he wasn't the regular Beech-Nut man, didn't you?

A. No—well, he wasn't selling the other stuff, but we thought he was maybe a specialty man.

X-Q. 48. But you knew he wasn't the regular agent for the Beech-Nut Company that you had been in the habit of buying from?

A. No, he wasn't the regular agent, no.

X-Q. 49. You didn't buy any of these cigarettes, did you?

A. No, we didn't, didn't buy no cigarettes.

X-Q. 50. I understood you to say that you had been selling this Beech-Nut scrap tobacco like this (indicating).

A. Yes, we got it in the store.

X-Q. 51. Where have you been buying it?

A. That I don't know. I don't know where the buyer bought it, but I know we have got it in the store.

X-Q. 52. You don't know who he bought this tobacco from?

A. I don't know where he bought it.

X-Q. 53. You don't ever remember buying any of that tobacco from the man who represented himself to be the Beech-Nut Packing Company representative?

A. No.

X-Q. 54. From the man who tried to sell you the Beech-Nut cigarettes, do you?

A. No, I do not.

X-Q. 55. Was that the first time you ever saw that man?

A. That is the first time I saw that man.

X-Q. 56. You haven't seen him since?

A. No, I haven't seen him since.

X-Q. 57. So far as you know, he might have been some

faker coming in just to mix you up on the cigarettes, might not he have been?

A. So far as I know, yes.

X-Q. 58. He didn't show you any credentials?

A. No.

X-Q. 59. He didn't give you any card?

A. No, he didn't give me no card.

X-Q. 60. He didn't say he was from the P. Lorillard Company, did he?

A. No, he didn't.

X-Q. 61. He didn't say he was from the Beech-Nut Packing Company?

A. He said he was selling the Beech-Nut cigarettes and tobacco.

X-Q. 62. But he did say he was from the Beech-Nut Packing Company?

A. I don't think he said that.

X-Q. 63. He didn't say who he was from, did he?

A. No, I don't think he said that.

X-Q. 64. Did you ever take the trouble to look at a package of that tobacco?

A. Yes, I have looked at it.

X-Q. 65. You have seen the name "Lorillard's" on it, haven't you?

A. No.

X-Q. 66. You didn't look at a package very closely, did you, and read it?

A. No, I never read it either.

X-Q. 67. I show you a package, Mrs. Petersen. You notice the name "Lorillard's" on it now?

A. Yes, I see it now.

X-Q. 68. Did you ever buy of P. Lorillard Company?

A. No, I did not.

X-Q. 69. If I understand the truth, then, you never took the trouble to read any of the printing, or anything, on the cigarettes?

A. Only the "Beech-Nut" is all I saw on there.

X-Q. 70. Just "Beech-Nut"?

A. Just that—"Beech-Nut Tobacco."

X-Q. 71. You didn't notice, then, the name "P. Lorillard"?

A. I never saw the cigarettes at all.

X-Q. 72. So, when this man was in the store—and I refer to the party who said the Beech-Nut Packing Company was putting out those cigarettes—you never took the trouble to look at the cigarettes, did you?

A. I never seen them. I don't know as he showed them there.

X-Q. 73. You didn't even see him showing them?

A. No, I didn't see him showing them.

X-Q. 74. And you don't know whether he was the man you buy your tobacco from, either?

A. No, I don't know that either; I don't know where we bought the tobacco.

X-Q. 75. So this was practically some stranger dropped in the place and told you that?

A. It is a man I never saw before and never saw him since.

X-Q. 76. And you don't know anything about him at all?

A. Don't know anything about him.

X-Q. 77. He simply dropped in and said—

A. (Interrupting) That is what he said.

X-Q. 78. (Continuing) —told you that the same concern made both food products and the cigarettes and tobacco?

A. Yes, talking about the peanut butter and all the rest and he said he was branching out from that to tobacco and cigarettes.

X-Q. 79. He just mentioned that in the course of conversation?

A. Yes, that is what he said.

X-Q. 80. He didn't leave you any samples of any cigarettes?

A. No, we didn't get any cigarettes. We have no cigarettes in our store, Beech-Nut.

X-Q. 81. And he didn't give you any prices on any of the cigarettes, that you know?

A. I believe he did give prices, but I didn't pay no attention to that.

X-Q. 82. Did he leave you any advertisement, or anything of the kind?

A. No.

X-Q. 83. Just walked in and talked about cigarettes and walked out again?

A. That is what he did.

X-Q. 84. You haven't the slightest idea where the man came from, have you?

A. No, I haven't. I don't know where he came from.

X-Q. 85. Now, I understood you to say that you were selling other Beech-Nut products like food products and chewing gum. If a man wanted some chewing gum or some Beech-Nut bacon, would you sell him a package of Beech-Nut tobacco for bacon or chewing gum?

A. No.

X-Q. 86. You would think he was crazy if he took it?

A. Yes.

X-Q. 87. In other words, they are entirely different goods, aren't they?

A. I should think so.

X-Q. 88. Then, Mrs. Petersen, so far as you know, of your own knowledge, this man that tried to sell you the Beech-Nut cigarettes might have been sent in there by the Beech-Nut Packing Company, might he not?

A. Yes, he might have been.

X-Q. 89. You don't know anything about it at all?

A. I don't know anything about it.

Mr. Cavanagh: That is all.



*Re-Direct Examination by Mr. Hinton.*

R-D. Q. 90. Mrs. Petersen, I simply want to clear up one or two points. Was this man trying to sell these cigarettes to you personally or were you present when

A. No, he wasn't trying to sell them to me. I simply overheard the conversation.

R-D. Q. 91. Now, Mrs. Petersen, if, as a result of the various questions you have been asked during this examination, there is any doubt whatever in your mind that that man tried to make you believe the Beech-Nut Packing Company were putting out these cigarettes, I wish you would say so.

A. I have no doubt but what he knew that we believed that he was selling those for the Packing Company, those cigarettes.

Deposition closed.

Signature waived.

H. N. PETERSEN, a witness produced in behalf of plaintiff pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposed as follows:

By Mr. Hinton: Q. 1. Will you please state your name, age, residence and occupation?

A. H. N. Petersen; I am forty-eight at present, will be forty-nine in January; live at Manitowoc, Wisconsin, 421 North Eighth street.

Q. 2. And what is your occupation?

A. Grocery business.

Q. 3. What is the name of the grocery store?

A. Petersen Brothers.

Q. 4. And are you one of the Petersen Brothers?

A. Yes, sir.

Q. 5. I show you a package of cigarettes in this case that is "Plaintiff's Exhibit No. 1." Have you ever seen these cigarettes before?

A. Yes, sir.

Q. 6. When was the first time you heard about these Beech-Nut cigarettes?

A. When that salesman was in the store that was trying to sell them.

Q. 7. Who was he trying to sell them to?

A. Well, he was asking about the buyer, and I told him the buyer wasn't in, exactly, but I asked him what he was selling, maybe I could give him a definite answer whether we would be in the market or not, so he told me then he was selling Beech-Nut cigarettes.

Q. 8. Can you state the conversation that you had with this man?

A. Well, pretty well, I guess.

Q. 9. I wish you would, please.

A. Well, then I says to him when he showed them cigarettes, I says: "Well, if those cigarettes are as good as the Beech-Nut peanut butter, it is a good line, but," I said, "we have never had them before." And I said to him then: "Well, that is a kind of peculiar line to go into, from the peanut butter into cigarettes," and he said then: "Well," he says, "they are branching out," so I never paid no attention to the tobacco, really, whose that was, and never thought any more of it at the time.

Q. 10. Well, do you remember whether this man said anything about where he had been immediately prior to coming into your store?

A. Yes, he said he had been up north and sold lots of them, they were fine cigarettes.

Q. 11. Did he mention any particular town he had been in in the north?

A. Well, he did, but I don't recollect that now, because I didn't think anything would turn up or I would have taken notice of that.

Q. 12. Who, if anybody else, was present at this conversation?

A. Who else was present?

Q. 13. Yes.

A. My brother's wife; she was in the room, I believe, at the time. There was another gentleman in with him, too, I believe, some other man, whether he was a salesman or not, I don't know.

Q. 14. You brother's wife—is it your brother's wife who has just testified in this case?

A. Yes.

Q. 15. Now, are you acquainted with Mr. Wesling?

Mr. Hinton: Mr. Wesling, will you please stand up? (Mr. Wesling stands up.)

The Witness: Yes, sir.

Q. 16. Who is Mr. Wesling?

A. He is with the Beech-Nut Packing Company.

Q. 17. Did Mr. Wesling make a subsequent visit to your store after this conversation you have just talked about?

A. I don't know if Mr. Wesling, but I think there was some other gentleman came in there.

Q. 18. You mean another Beech-Nut Packing Company man?

A. Yes, that is what I took him for. Of course, I had never seen that gentleman before.

Q. 19. But do you remember what, if anything, you said to this other Beech-Nut Packing Company man when he came in?

A. Yes, I think I mentioned to him, I said: "How many men have you people got on the road making this

territory?" I didn't think any more of it, and just asked him that question.

Q. 20. How long after this conversation you had with the man who tried to sell you Beech-Nut cigarettes was it that the Beech-Nut Packing Company man came in?

A. I think it was the week after.

Q. 21. How long is it usually, Mr. Petersen, between the visits of Beech-Nut Packing Company men to your town or store?

A. Well, really I never paid so much attention to it, but something around six weeks, I should judge.

Q. 22. How long was this conversation you had with this person who tried to sell cigarettes, do you suppose?

A. Oh, it wasn't very long, somewhere around fifteen minutes, somewhere around there.

Q. 23. Were you discussing Beech-Nut cigarettes and Beech-Nut Packing Company products in this conversation?

A. No, there was no more said about it, only I said that we had some tobacco over there that didn't sell at all, I says, but I never stopped to think that it was the same as—I figured on that as the Beech-Nut Packing Company line. I never paid no attention to the name on there.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 24. I understand, Mr. Petersen, that you buy products of the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 25. Various food products and chewing gum?

A. Yes, sir.

X-Q. 26. And you buy those from the regular Beech-Nut agent, do you not?

A. Yes, sir.

X-Q. 27. And that agent is this gentleman in the room, Mr. Wesling?

A. Yes, that is the name.

X-Q. 28. He is the one that you have been accustomed to buying from all the time?

A. Yes.

X-Q. 29. He is not the man that wanted to sell you the tobacco, is he?

A. No, sir.

X-Q. 30. Or the cigarettes, rather?

A. No, sir.

X-Q. 31. He is not the man that wanted to sell you the Beech-Nut cigarettes?

A. No, sir.

X-Q. 32. From whom did you buy this Beech-Nut tobacco?

A. Well, now, I will leave that unsaid, because it is so long since we bought that tobacco. My brother did the buying.

X-Q. 33. But you were accustomed to buying your regular Beech-Nut Packing Company products, such as food and chewing gum, from this Beech-Nut man here (indicating Mr. Wesling)?

A. Yes, sir.

X-Q. 34. And a stranger came in and wanted to sell you the Beech-Nut cigarettes?

A. Yes, sir.

X-Q. 35. Now, I want you to think this over very carefully. Did this man, when he came in, say that he represented the Beech-Nut Packing Company?

A. He meant it this way, that I said to him: "Well, if it is the same people—"

Mr. Cavanagh: Would you just answer the question?

Mr. Hinton: Let him answer. He is entitled to finish his answer.

A. (Continuing) I asked him, "If it is the same people that turn out the cigarettes as the peanut butter, it is a good article, no question about it," and he said: "Yes." I said: "But that is a funny thing to branch out in that line from peanut butter," and he said: "Well, they are branching out." That is all he said.

Mr. Cavanagh: X-Q. 36. Then, he didn't say these cigarettes were made by the Beech-Nut Packing Company, did he?

A. No, he didn't say that that I understood, but I thought when I mentioned the peanut butter that would be sufficient.

X-Q. 37. As a matter fact, he didn't say those cigarettes were made by the Beech-Nut Packing Company?

A. No, he didn't say that, that I heard.

X-Q. 38. Do you know of the P. Lorillard Company?

A. No, sir.

X-Q. 39. Do you use tobacco?

A. Yes, I use some.

X-Q. 40. Do you smoke and chew?

A. Well, a little, chew a little, but not very much.

X-Q. 41. Did this party you had this conversation with, when he tried to sell you the Beech-Nut cigarettes, leave you any samples of these cigarettes?

A. No, sir.

X-Q. 42. Did he leave any advertising matter?

A. No, sir.

X-Q. 43. Did he leave his card?

A. No.

X-Q. 44. Did he tell his name?

A. Well, I don't know but he might have done that, but I didn't take notice.

X-Q. 45. But you don't know his name or the name he told you?

A. No.

X-Q. 46. Did he leave you any advertising matter?

A. No, sir.

X-Q. 47. He didn't tell you who made the cigarettes?

A. Well, showed this cigarette, and as I said before.

X-Q. 48. Oh, he showed you the cigarette?

A. Oh, yes, he had one of them cartons, twenty in there or whatever it was, yes, he showed it to me.

X-Q. 49. He just had a small carton of the cigarettes?

A. Yes, he had one of them small cartons, he held it up and showed me so I could see the label and see the "Beech-Nut," that is all I could see.

X-Q. 50. So he showed you the carton of cigarettes?

A. Yes, sir.

X-Q. 51. He also showed you the individual package?

A. Yes, sir.

X-Q. 52. Now, on this scrap tobacco you see the name "Lorillard's" on there, don't you (indicating)?

A. Yes, sir.

X-Q. 53. You don't find the name "Beech-Nut Packing Company" any place on that package, do you?

A. No.

X-Q. 54. And the goods of the Beech-Nut Packing Company, for example, as shown on this label, "Defendant's Cross Exhibit 8," which is a bacon label, that has the words "Beech-Nut Packing Company, Canajoharie, N. Y., U. S. A."?

A. Yes.

X-Q. 55. That is the regular Beech-Nut label, is it not?

A. Yes, sir.

X-Q. 56. You notice on this package of Beech-Nut cigarettes the name "P. Lorillard Co." on it, don't you (indicating)?

A. Down at the bottom, yes, sir.

X-Q. 57. You don't find the Beech-Nut Packing Company's name on this label, do you (indicating)?

A. No, I don't see it.

X-Q. 58. You never saw this man again?

A. No, sir, I did not.

X-Q. 59. You didn't buy anything from him?

A. No.

X-Q. 60. You yourself thought it would be peculiar that the Beech-Nut Packing Company should take up such a widely different line of goods as tobacco?

A. Yes.

X-Q. 61. It had nothing to do with food products?

A. No.

X-Q. 62. You considered them an entirely different class of goods, didn't you?

A. I would, yes, sir.

X-Q. 63. And if a man came into your store and wanted some Beech-Nut bacon or wanted some Beech-Nut chewing gum, you would think he was a fool or crazy if he took tobacco in place of the article he asked for?

A. It would seem that way to me, it would be funny.

X-Q. 64. And as a common-sense man you wouldn't give him tobacco or cigarettes when he asked you for Beech-Nut food products or gum?

A. No, sir.

X-Q. 65. And that is because they are an entirely different class of goods?

A. Yes, sir, sure.

X-Q. 66. That man that you had the conversation with about cigarettes, so far as you know, he might have been from the Beech-Nut Packing Company, might he not?

A. Yes, sir.



X-Q. 67. He might have been sent in there on a framed up proposition, so far as you know?

A. I thought he was a specialty man, or either the other man, something had happened to him, or he was put in to cover his territory, or something like that.

X-Q. 68. But he might have come from those people?

A. Sure, he might.

X-Q. 69. Might just have been a party sent in there to tell you that, so far as you know, mightn't he?

A. Yes, couldn't tell.

X-Q. 70. You couldn't say anything about it?

A. No, sir.

X-Q. 71. Mr. Petersen, I show you a carton of Beech-Nut cigarettes, which have been heretofore introduced in this case as "Defendant's Cross Exhibit 9." Does that look like the carton of cigarettes he showed you?

A. As near as I recollect, this tobacco cover was off (indicating), and there was a slit underneath, and he exhibited them up like that in front of me.

X-Q. 72. Oh, the cover was off?

A. The cover was off. I could see the "Beech-Nut" and then he held up one package like that (indicating), took it out of the box and held it up.

X-Q. 73. You were not looking at the package?

A. No, because I was standing as far away as from here to my brother's wife (indicating).

X-Q. 74. Didn't take time to look at the package?

A. No, sir.

X-Q. 75. On the outside of this carton you see the name "Lorillard's," don't you (indicating)?

A. Yes, sir.

X-Q. 76. And there is a slip in this carton marked "P. Lorillard & Co., Manufacturers"?

A. Yes, sir.

X-Q. 77. Referring to those Beech-Nut cigarettes, and says: "Please Read," headed "Please Read."

A. Yes, sir.

X-Q. 78. There is also a small red card marked "Lorillard's Beech-Nut Perfect Cigarettes," isn't there?

A. Yes.

X-Q. 79. Do you remember seeing that little card?

A. No, sir, I do not.

X-Q. 80. Or the slip?

A. No.

X-Q. 81. Just opened the carton—

A. I didn't see this on it at all (indicating), only this front part as he held it up. I didn't see this top cover on it at all.

X-Q. 82. Just had the box open, showing the cigarettes?

A. Showing the cigarettes, yes.

X-Q. 83. Packed in?

A. Yes.

Mr. Cavanagh: That is all.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 84. Mr. Petersen, do you now remember whether the Beech-Nut Packing Company man who came into your store approximately a week after the man who tried to sell cigarettes was Mr. Wesling; is it any clearer to you now than it was a few minutes ago?

A. Well, now, I don't think it was Mr. Wesling, it was a special man that come in to pick up points about this cigarette, it seems to me, because when he came in and spoke about that—that wasn't you, was it, Mr. Wesling?

Mr. Wesling: No.

The Witness: (Continuing.) I am pretty sure it was some other man. I am pretty sure of that, and when he came in he started to talk about the Beech-Nut line, and I spoke then to him: "How many is there representing the Beech-Nut Packing Company?" I didn't think any more of it.

Mr. Hinton: R-D. Q. 85. Was he trying to sell you products?

A. He was representing the Beech-Nut products.

R-D. Q. 86. He was selling?

A. Yes, and he took down the notes then what this other tobacco man had.

R-D. Q. 87. Do you know Mr. Lewis, of the Beech-Nut Packing Company, the division manager here?

A. No, this is the only gentleman I really know that has been coming in there (indicating Mr. Wesling).

R-D. Q. 88. Do you know whether Beech-Nut cigarettes are now being sold in Manitowoc in other stores?

A. If I know they are sold?

R-D. Q. 89. Why, yes.

A. Yes, sir; I seen them in the barber shop.

R-D. Q. 90. And do you know whether they appeared there before or after the visit of this first man who tried to sell you cigarettes?

A. No, the only time after that, after this man had been trying to sell cigarettes, and I was in there last Wednesday, I think it was yesterday, and as I was going out they had a tobacco exhibit in the window and I noticed one of them packages there, and I then asked if they handled the Beech-Nut cigarettes.

R-D. Q. 91. Those are the first Beech-Nut cigarettes you saw on sale in Manitowoc?

A. Yes, sir.

R-D. Q. 92. How long ago was this case where the man came into your store and tried to sell you Beech-Nut cigarettes?

A. I should judge maybe about three weeks ago.

Mr. Hinton: That is all.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 93. When this second Beech-Nut man came in, after the man tried to sell you the cigarettes, you state that he was not Mr. Wesling, was he?

A. No, I don't recollect it was this man (indicating Mr. Wesling).

R-X Q. 94. But Mr. Wesling is the man that usually comes in?

A. Yes, sir.

R-X Q. 95. And you didn't know this other Beech-Nut man, did you?

A. Not until he introduced himself.

R-X Q. 96. Did he ask you for an order?

A. No.

R-X Q. 97. He wasn't selling you anything, was he?

A. No.

R-X Q. 98. He was asking about those cigarettes?

A. Yes, sir.

R-X Q. 99. He was digging up information, wasn't he?

A. It seems that way, yes, sir.

R-X Q. 100. And after this first mysterious cigarette man was in, this other man came around to dig up the information?

A. Yes, sir.

Mr. Cavanagh: That is all.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 101. Now, you have testified that a man came in and you said: "How many Beech-Nut salesmen have you got," or something of that character.

A. Yes, sir.

R-D. Q. 102. Now, can you state what you said then, what you told him?

A. Yes, I said then: "It is a peculiar thing for them

to branch into cigarettes from other lines of peanut butter and that other product."

R-D. Q. 103. Evidently you didn't understand my question. I am talking about the Beech-Nut salesman who came in about a week after the man who tried to sell you the cigarettes.

A. Oh, the real Beech-Nut man?

R-D. Q. 104. Yes, the real Beech-Nut man. What I want to get at is, what you said to him when he came in.

A. Well, he introduced himself, he came in in a joking way, I greeted him, greeted the time of day, and I said he was with the Beech-Nut Packing Company? And then I says to him, "How many men have they got out?" Then he came out with it, and I told him, as I said before, about this here tobacco, and he took down the notes of it; then I told him: "Now, don't write anything down, because I don't want to have any trouble about it," and he said: "Oh, no, there won't be anything about it."

R-D. Q. 105. That is, you made this remark to him first, that you have just said?

A. Yes.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 106. Just a few questions. Is there a gentleman in the room by the name of Atkinson?

(Mr. Atkinson rises.)

R-X Q. 107. Does he resemble the man that was in to see you, the man that took down the notes about the Beech-Nut tobacco and Beech-Nut Packing Company?

A. No, I didn't pay such strict attention.

R-X Q. 108. But he didn't ask you for an order for goods, did he?

A. No, sir.

R-X Q. 109. Spent all his time talking about this cigarette case, as a matter of fact, didn't he?

A. Who is that?

R-X Q. 110. That other Beech-Nut man, the last man that was in?

A. This man here (indicating Mr. Wesling)?

R-X Q. 111. Is that the man?

A. That is the last man that I saw in the store.

R-X Q. 112. Is that the man who spoke about the Beech-Nut cigarettes?

A. No.

R-X Q. 113. But he is the one took down the notes for the Beech-Nut Packing Company?

A. No, there was one before him, I think, took it. I don't know who that was.

R-X Q. 114. There are three Beech-Nut Packing Company men in the room, Mr. Wesling, Mr. Atkinson and Mr. Lewis.

A. I never paid enough attention.

R-X Q. 115. Is it either one of those men? Was it either one of those three men?

A. That came in the second time, you mean?

R-X Q. 116. That came in to investigate this cigarette.

A. That I wouldn't swear to now, it is so long ago now. I didn't take enough notice which one of them it was.

Mr. Cavanagh: That is all.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 117. Quite aside from this situation we are talking about, the man who has just come into the room, standing over there, have you seen him before that you recognize him (counsel indicates Mr. Lewis)?

A. Yes, sir.

R-D. Q. 118. Do you know his name?

A. He did say his name, but I don't remember just what it was.

Mr. Hinton: That is all.

Mr. Cavanagh: That is all.

Deposition closed.

Signature waived.

MRS. AMELIA PETERSEN, a witness produced in behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

*Examined by Mr. Hinton.*

Q. 1. Mrs. Petersen, you have testified this morning that a man came into your store and tried to sell Beech-Nut cigarettes. Now, when did the regular Beech-Nut man come around after that, do you remember?

A. About a week after.

Q. 2. And who was he?

A. That is the man over there (indicating Mr. Wesling).

Q. 3. This man right here (indicating)?

A. That is the man.

Q. 4. Mr. Wesling?

A. Yes.

Q. 5. He is the regular Beech-Nut salesman?

A. He is the regular Beech-Nut salesman.

Q. 6. Do you remember whether your brother made any remark to Mr. Wesling when he came in a week after the cigarette salesman?

Mr. Cavanagh: That is all objected to.

A. Yes.

Q. 7. What did he say?

A. He said: "Was there somebody here before?" and then he told him a week before about that tobacco man.

Q. 8. I want to get what, if anything, you heard your brother say to Mr. Wesling when he came into your store about a week after the man tried to sell you Beech-Nut cigarettes. Do you understand that question?

Mr. Cavanagh: That question is objected to as merely calling for hearsay; furthermore, as incompetent, as the witness has not been shown qualified to answer.

A. He asked him how many Beech-Nut men there were.

Mr. Hinton: Q. 9. And what did Mr. Wesling say?

Mr. Cavanagh: Same objection.

A. He said: "Why, has there been some before?"

Mr. Hinton: Q. 10. Then what did your brother say?

Mr. Cavanagh: Same objection.

A. Then he told him about the tobacco man that had been there the week before trying to sell cigarettes.

Mr. Hinton: That is all.

Mr. Cavanagh: That is all. No cross-examination.

Deposition closed.

Signature waived.

O. M. WESLING, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Please state your name, age, residence and occupation.

A. O. M. Wesling; 48 years old on September 16th; live at 1182 26th avenue; occupation, salesman for the Beech-Nut Packing Company.



Q. 2. How long have you been an employee of the Beech-Nut Packing Company, and in what territory?

A. State of Wisconsin, about nine months.

Q. 3. Mr. Wesling, were you present in the room this morning when Mr. and Mrs. Petersen testified?

A. I was.

Q. 4. Are you the Mr. Wesling that stood up once or twice to be identified by Mr. and Mrs. Petersen?

A. I was.

Q. 5. Do you make the town of Manitowoc, Wisconsin?

A. I do.

Q. 6. About how often do you go through there?

A. About every two months.

Q. 7. When was the last time you were there?

A. Last week.

Q. 8. Are you acquainted with Mr. and Mrs. Petersen, who testified this morning?

A. I am.

Q. 9. Do they run a grocery store in Manitowoc?

A. Yes, sir.

Q. 10. Did you go into that store the last time you were there?

A. I did.

Q. 11. For what purpose?

A. To sell Beech-Nut products.

Q. 12. Had you been directly or indirectly instructed by anybody, prior to going into that store—

A. (Interrupting.) I was not, outside of to go in and sell Beech-Nut Packing goods.

Q. 13. You did not permit me to finish my question, I will therefore repeat it. Had you been directly or indirectly instructed by anybody, prior to going into that store, to go there for the purpose of getting evidence in this case?

A. I was not.

Q. 14. Did you, as a matter of fact, go there for the purpose of getting evidence in this case?

A. No, sir.

Q. 15. Now, when you went into that store, who was there?

A. Mrs. Petersen and her brother-in-law, Mr. Petersen. He is not the buyer.

Q. 16. That Mr. and Mrs. Petersen who were here? The same two who testified this morning?

A. They were.

Q. 17. Now, what was said?

A. When I went in there I told them who I was and introduced myself; in fact, they knew who I was, they said: "How many Beech-Nut men have they got on this territory?" and I said: "Why?" He said: "There has been a man here last week," and I said: "No, I am the only man on this territory for the Beech-Nut Packing Company." Then he went on and told me it was some specialty man had been in selling Beech-Nut cigarettes and tobacco, and I said: "What did you do about it?" He said, well, they didn't buy any because "I didn't do the buying in there." The brother does the buying, see, and this man told them the Beech-Nut Packing Company was branching out into the tobacco business, and that they were made by the Beech-Nut Packing Company that makes the Beech-Nut catsup and butter.

Mr. Cavanagh: All that portion of the answer with reference to the alleged conversation between the alleged tobacco salesman and the Petersens is objected to as merely hearsay.

Q. 18. Did you make a note of what this man said?

A. I did.

Q. 19. And who was the first person to whom you disclosed what had been said to you by this Mr. Petersen?

A. To you and Mr. Lewis, the district manager.

Q. 20. And when was that?

A. Last week Friday.

Q. 21. A week ago today?

A. A week ago today.

Q. 22. And where was it?

A. Down in the Hotel Wisconsin lobby.

Q. 23. Did you make other calls in Manitowoc?

A. I did.

Q. 24. At the same time?

A. I did.

Q. 25. Did you call on your regular trade?

A. On all of the groceries.

Q. 26. Was this trip that you made to Manitowoc in any way made for the purpose of obtaining evidence in this case?

A. It was not.

Q. 27. I show you a package of Beech-Nut cigarettes, in this case "Plaintiff's Exhibit No. 1." Have you seen these cigarettes before?

A. I have.

Q. 28. Have they been offered for sale and displayed by posters in Milwaukee?

A. They have.

Q. 29. Have you heard any comment, remarks and inquiries about these cigarettes since they came out in this territory?

A. Lots of them.

Q. 30. And what is the nature of those comments, remarks and inquiries?

A. There is a few instances I can remember right now. There is a man over here in Manitowoc said: "Why don't you give me a package of Beech-Nut cigarettes instead of mint samples?"

Q. 31. Can you give any more you can remember definitely?

A. The grocery buyer of the Two Rivers Mercantile Company said: "Why don't you pass Beech-Nut cigarettes around instead of gum and mints?"

Q. 32. What was his name?

A. I couldn't tell you what his name is.

Q. 33. Where was he?

A. Right in the grocery department of the Mercantile Company of Two Rivers.

Q. 34. Can you give me some more?

A. Yes. "So you are making Beech-Nut cigarettes and tobacco, too, now." That was said by the clerk at the Sheboygan Hotel, the Grand.

Q. 35. How many times do you suppose you have heard that kind of comment, remark and inquiry?

A. I couldn't give you a definite number on that. A couple of hundred times if once.

Q. 36. What line do you sell for the Beech-Nut Packing Company?

A. Everything the Beech-Nut Packing Company makes, a full line.

Q. 37. How long have you sold the full line?

A. Six months.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 38. Do you sell the Mohawk Brand for the Beech-Nut Packing Company?

A. It is all Beech-Nut Packing Company, isn't it?

X-Q. 39. The Beech-Nut Packing Company, I say, do you sell the Mohawk Brand for the Beech-Nut Packing Company?

A. What do you mean by "Mohawk Brand"?

X-Q. 40. Do you sell the Erie Brand?

A. Yes, sir.

X-Q. 41. But you don't sell the Mohawk?

A. I didn't know they made any.

X-Q. 42. Do you sell tinfoil?

A. Yes, sir, the gum comes in tinfoil and the mints.

X-Q. 43. I mean, do you sell foil as a separate commodity?

A. No.

X-Q. 44. You don't remember ever selling the Mo-hawk Brand?

A. No, sir.

X-Q. 45. So you don't sell everything the Beech-Nut Packing Company makes?

A. Everything that comes on my regular price list.

X-Q. 46. So you don't know whether you sell everything that they make or not, do you?

A. I understood everything that is on the price list is what they make.

X-Q. 47. Did you ever sell any tobacco for the Beech-Nut Packing Company?

A. I did not.

X-Q. 48. Either scrap tobacco or cigarettes?

A. No, sir.

X-Q. 49. Never took an order on behalf of the Beech-Nut Packing Company for tobacco or cigarettes?

A. No, sir.

X-Q. 50. Your line is practically food products, with candy contraptions and ginger ale and things of that sort?

A. Yes, sir.

X-Q. 51. You say that approximately several hundred people have asked you if the Beech-Nut Packing Company were putting out this Beech-Nut cigarette, a package of which was shown you.

A. Yes, sir.

Mr. Hinton: Objected to. It is not exactly what the witness said.

Mr. Cavanagh: I don't mean to mislead you or to quote you incorrectly, and I will put the question this way:

X-Q. 52. You have stated that you had perhaps a couple of hundred inquiries as to the Beech-Nut Packing Company making the cigarettes. You don't know if those people ever took the trouble to look at the package, do you?

A. I do not.

X-Q. 53. You have never sold tobacco products at all, have you, in your business?

A. No, sir.

X-Q. 54. You never knew the Beech-Nut Packing Company to sell a package of goods that looks like that, did you? (Counsel indicates.)

A. No, I did not.

X-Q. 55. I refer to the package of scrap tobacco. And likewise you never knew them to sell a package that looks like that, did you (indicating)?

A. No, sir.

Mr. Cavanagh: I refer to the cigarette package, Exhibit No. 1.

X-Q. 56. You would recognize that cigarette package, when you glanced at it, as a package of cigarettes, would you not?

A. Yes, sir.

X-Q. 57. It has got a personality, as it were, all of its own?

A. Yes, sir.

X-Q. 58. Now, you said that you had some conversation with Mr. and Mrs. Petersen at Manitowoc, Wisconsin, concerning the alleged visit of a so-called salesman who was trying to sell Beech-Nut cigarettes to the Petersen Brothers' store. When did you have this conversation with Mr. and Mrs. Petersen?

A. This was a week ago Wednesday—either Tuesday or Wednesday, I don't know exactly what day it was, it was either Tuesday or Wednesday.

X-Q. 59. At the Petersen Brothers' store?

A. Yes, sir.

X-Q. 60. How long did this conversation last, about?

A. Oh, I couldn't tell. About ten or fifteen minutes, I should judge. I wouldn't say for sure. I didn't pay no attention to how long it did last.

X-Q. 61. Was it a general conversation?

A. Yes, sir.

X-Q. 62. Do you write shorthand?

A. No, sir.

X-Q. 63. You said you made some notes of this conversation.

A. I just wrote down what he had told me; that is all.

X-Q. 64. Where are those notes?

A. I don't know. I might have them on the back of one of my letters, that is all I had. (Witness produces long envelope with pencil memorandum on back.)

X-Q. 65. Then as a result of this fifteen minute conversation—

A. (interrupting) I couldn't say how long it did take. I imagine about that long.

X-Q. 66. Then as a result of this approximately fifteen minute conversation the only note you made consisted of the words: "Tobacco salesman told them made by same Co. Branching out in tob.," and this note is on the back of an envelope, isn't it?

A. Yes, sir.

X-Q. 67. There is no date on that note, is there?

A. No, sir.

X-Q. 68. There is no statement on there as to who made any such statement?

A. I know who made the statement.

X-Q. 69. But there is nothing here to indicate?

A. No, sir.

X-Q. 70. There is nothing here to indicate when this note was made, is there?

A. No, sir.

X-Q. 71. There is no repeating or transmission of the exact alleged words of Mr. or Mrs. Petersen in that?

A. That is just putting it in the short way they told it to me.

X-Q. 72. In other words, it is your own stuff?

A. Yes.

X-Q. 73. But you didn't take down what they said, did you?

A. No, sir.

X-Q. 74. The word "Beech-Nut" or "Beech-Nut Packing Company" does not appear in that note at all, does it?

A. No, sir.

X-Q. 75. So far as that note shows, that thing might have been made yesterday, might it not, so far as that note shows?

A. There is no date on that; it was made at the same time I was out to the store.

X-Q. 76. But so far as it shows, it might have been made yesterday?

A. There is not a date on it, no.

X-Q. 77. You never saw this salesman that they talked about, did you?

A. No, sir.

X-Q. 78. You never run across him in the territory?

A. No, sir.

X-Q. 79. Did you ever hear of P. Lorillard Company?



A. I have lately. Of course, I never paid no attention to it before that.

X-Q. 80. You smoke and chew tobacco?

A. Smoke cigars, that is all.

X-Q. 81. Don't use cigarettes?

A. No, sir.

X-Q. 82. Or tobacco, pipe?

A. Smoke a pipe of Prince Albert once in awhile.

X-Q. 83. You never bought a package of this tobacco (indicating)?

A. No, sir.

X-Q. 84. Or a package of the cigarettes, did you?

A. No, sir.

X-Q. 85. You wouldn't confuse tobacco with food products, would you?

A. I would not, no.

X-Q. 86. An entirely different class of goods, aren't they?

A. Why, certainly it is.

X-Q. 87. Tobacco is tobacco, isn't it?

A. Yes.

X-Q. 88. To cut short any lengthy examination about this so-called visit of the alleged tobacco salesman to Petersen Brothers, all that you know about it is what Mr. and Mrs. Petersen told you?

A. Yes, sir.

Mr. Cavanagh: That is all.

*Re-Direct Examination by Mr. Hinton.*

R-D.Q. 89. On cross-examination you were asked about what Mr. Petersen said to you, to which you had testified on your direct examination, and you have just testified that at the time of that conversation you made a note on the back of an envelope. Have you a clear recollection of making that note?

A. Yes sir.

R-D. Q. 90. Is this the envelope that you have produced with the inscription on the back: "Tobacco salesman told them made by same Co. Branching out in tob."—is that the note you made then?

A. That is the note I made the day I was over there to the store on my regular call over there.

R-D. Q. 91. In whose possession has this since been?

A. In my own only.

R-D. Q. 92. Have you a clear recollection of the conversation that you had with Mr. Petersen a week from last Wednesday?

A. Yes, sir.

Mr. Hinton: The envelope produced containing the memorandum in question is offered in evidence as Plaintiff's Exhibit No. 8, Wesling Memorandum.

Witness is permitted to take half of the envelope which contained an irrelevant notice of his own, leaving the half with the note on for the exhibit.

Deposition closed.

Signature waived.

MISS C. HELLER, a witness produced on behalf of the plaintiff pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name, residence, occupation, and if you care to, your age or the fact that you are of legal age?

A. My name and address, do you mean?

Q. 2. Yes.

A. Well, my name is Miss C. Heller; I reside at 1061 8th street; occupation, clerk and bookkeeper, everything combined, and do you want to know how old I am?

Q. 3. No, if you are of legal age?

A. I am not ashamed of it; I am twenty-four.

Q. 4. What store is it that you work in, Miss Heller?

A. C. H. Beese.

Q. 5. Where is it located?

A. 701, on Murray Avenue, Milwaukee, Wisconsin.

Q. 6. What kind of store is that?

A. It is considered one of the best stores on the east side.

Q. 7. What do they sell?

A. A full line of groceries.

Q. 8. Do you sell cigarettes or any tobacco in that store?

A. No, sir, we do not.

Q. 9. Have you ever heard about Beech-Nut cigarettes, a package of which I now show you, and which is in this case as "Plaintiff's Exhibit 1"?

A. Yes, I have.

Q. 10. Please tell me approximately when and how you first heard about these Beech-Nut cigarettes.

A. About two months ago a salesman came in and asked me whether we wanted to buy any Beech-Nut cigarettes, and I said: "No, we didn't carry cigars nor tobacco," so I asked him where our little friend, Mr. Heube was, or rather, the little salesman, and he said whether he wouldn't do. Then I asked him whether he was just taking charge of the cigarette and tobacco part, taking orders for that, so he said: No, he could take the order for anything else if I wanted to give it to him.

Q. 11. Who is Mr. Heube?

A. Formerly a salesman for the Beech-Nut people.

Q. 12. How long, approximately, Miss Heller, did this conversation last that you had with this man?

A. I think about half an hour.

Q. 13. When you went out of the store, who did you believe was putting out the Beech-Nut cigarette?

A. I thought surely it was put up by the same firm as any of the other goods is put up.

Q. 14. I wish you would do your best to describe for me the appearance of this man who came into your store?

A. He was about a medium sized man and he wore a dark overcoat, that is about all I can tell, as much as I remember.

Q. 15. Was there anyone present in the store at the time of this conversation?

A. Just myself and Miss Springer.

Q. 16. Do you think you would recognize this man if we could locate him?

A. Why, yes, I think I would.

Q. 17. If you would see him around Milwaukee, do you think you would know him?

A. Why, I don't think I would, no. I wouldn't know him. I couldn't recognize him that close, you know.

Q. 18. I understand you don't think you could pick him off the street out of a crowd?

A. No, I don't think I could.

Q. 19. Well, do you happen to remember, Miss Heller, whether you were back in the store or in front, or where you were, when this conversation took place?

A. Why, yes, I was at a side counter doing up prunes.

Q. 20. I ask that question to find out whether it was broad daylight.

A. Oh, yes, it was. It was about three o'clock in the afternoon, maybe a little better, about 3:30.

Q. 21. If you should happen to see this man again at any time, would you be willing to let Mr. Lewis or Mr. Wesling, of the Beech-Nut Packing Company, know that you had seen him and where you have seen him?

A. Why, yes.

Q. 22. Tell me, how do you greet or address Beech-

Nut Packing Company men when they come into your store, provided, of course, you know them?

A. We usually call them the "Beech-Nut man."

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 23. I understand you do not sell cigarettes at all, or tobacco products?

A. No, sir, we do not.

X-Q. 24. But you do handle the Beech-Nut line of food products?

A. Yes, we do.

X-Q. 25. Chewing gum?

A. Why, yes.

X-Q. 26. Ginger ale?

A. Not ginger ale, no, sir.

X-Q. 27. Chewing gum and food products?

A. Yes.

X-Q. 28. And you buy all of those direct from the Beech-Nut man, do you not?

A. Yes, sir.

X-Q. 29. That is, he calls around and takes the order?

A. Yes. Of course, if we run short on anything, Mr. gives his order to the Association, of course.

X-Q. 30. But it goes to the Beech-Nut Packing Company?

A. Yes.

X-Q. 31. And when this man came in there did he give you his name?

A. No, sir, he did not.

X-Q. 32. Do you know what his name was?

A. No, I don't remember. I don't even remember whether he gave me his name or not.

X-Q. 33. Did he leave a card?

A. No, sir, he did not.

X-Q. 34. Did he show you any credentials?

A. Yes, he showed us the package of cigarettes.

X-Q. 35. I mean, did he show you any card or letter of any kind we may call a credential?

A. No, sir, not a thing.

X-Q. 36. Showing that he was a salesman?

A. No.

X-Q. 37. Did he say that he was a salesman for the Beech-Nut Packing Company?

A. No, he didn't say he was a salesman for the Beech-Nut Packing Company, but he let me understand that it was all the same firm, that he was from the same firm.

X-Q. 38. But that was just an impression you gathered, you say?

A. He didn't say exactly, no, sir, he didn't, but when I asked him about an order he said whether he wouldn't do, and certainly that would give you an idea that he was from the same firm.

X-Q. 39. He didn't say he was just a tobacco salesman, did he?

A. No, sir, he didn't tell me that.

X-Q. 40. And he didn't say he represented any tobacco jobber or tobacco house, did he?

A. No, sir, he didn't.

X-Q. 41. But he did volunteer to take any order for Beech-Nut products you would give him?

A. Why, yes, he said if he wouldn't do to give an order to.

X-Q. 42. When you would give an order for Beech-Nut Packing Company products, a house of your standing, you do not pay cash right across to the agent for the goods you order?

A. No, sir, we do not.

X-Q. 43. A bill would come through from the Beech-Nut Packing Company for the amount of goods you ordered?

A. Yes.

X-Q. 44. So that this party that came in, if he was a faker, you wouldn't have paid him any money?

A. Oh, no, I wouldn't have.

X-Q. 45. That would have probably been done by check?

A. Mr. Wesling usually signed the check, yes, sir.

X-Q. 46. And he offered to take an order for food products of the Beech-Nut Packing Company from you?

A. Yes.

X-Q. 47. And you presumed in the course of business he would send that to the Packing Company?

A. Yes, sir.

X-Q. 48. You never ordered anything from any tobacco company at all, did you?

A. No, sir.

X-Q. 49. You don't know of any of the tobacco companies, in your business?

A. No, I do not.

X-Q. 50. You didn't take the trouble to examine this cigarette package, did you (indicating)?

A. No, sir, I did not.

X-Q. 51. Didn't look at it at all?

A. No, sir, didn't interest me at all.

X-Q. 52. Did he have a carton of these cigarettes, or just a single package?

A. I think he had just a single package, if I am not mistaken, I am not real sure about that, though.

X-Q. 53. But he didn't tell you in so many words those cigarettes were made by the Beech-Nut Packing Company, did he?

A. No; he just said the Beech-Nut cigarettes, that is all he told me.

X-Q. 54. Then you asked him about the order, and he said he would send it to the Beech-Nut Company?

A. He didn't say he was going to send it to the Beech-Nut Company, but he asked me whether he wouldn't do to take the order.

X-Q. 55. Then in the ordinary course of business you would take him to be a salesman for the Beech-Nut Packing Company?

A. Yes.

X-Q. 56. And so far as you know today, he was a salesman for the Beech-Nut Packing Company, wasn't he?

A. I know better now, but I did take it at the time for granted that he was from the Beech-Nut Packing Company.

X-Q. 57. Now, how do you know better today?

A. Why, through the salesman coming to the store. You can't imagine they would want us to come down here and go through all of this if it was direct from them.

X-Q. 58. But, as a matter of fact, you personally don't know whether your first impression was right or wrong? The Beech-Nut Packing Company people might have sent that man there, as far as you know?

A. Yes, they might have. Of course, I don't know that.

X-Q. 59. In other words, that might have been a frame-up, they might have sent a man there, as far as you know personally?

A. Yes, of course, if these fellows hadn't come I would still be under the impression it was put up by the same firm as Beech-Nut Packing Company.

X-Q. 60. And that impression that he was a Beech-Nut Packing Company man was strengthened by the fact that he volunteered to take an order for Beech-Nut Packing Company food products; isn't that right?

A. Yes, sir.

X-Q. 61. You say you would hardly know him if you saw him again?



A. I don't know. I think I would recognize him if anybody brought him in, of course, but I couldn't pass him onto anybody when I walked along the street, there is so many come in I can't recognize them all.

X-Q. 62. Did you personally ever sell over the counter any tobacco products at any place at all?

A. Not at Mr. Beese's, no, sir.

X-Q. 63. Did you ever sell any?

A. Yes, I did.

X-Q. 64. Did you ever hear of P. Lorillard Company?

A. No, sir, I never have.

X-Q. 65. As a person who has been selling goods over a counter, if a customer came into your store and wanted to buy a Beech-Nut Packing Company's food product, or Beech-Nut chewing gum, would you hand him Beech-Nut scrap tobacco or Beech-Nut cigarettes if he asked you got gum or food products?

A. I suppose I would. I would think if he liked the rest of it he surely would take the tobacco also.

X-Q. 66. But, supposing a man came to your store and said, "I want a package of Beech-Nut chewing gum," would you sell him that package of Beech-Nut cigarettes (indicating) in place of that chewing gum?

A. No, not in place of it.

X-Q. 67. You wouldn't confuse the two goods, would you?

A. No.

X-Q. 68. They are entirely a different class of goods, aren't they?

A. Yes, sir.

X-Q. 69. One is tobacco and one is gum?

A. Yes.

X-Q. 70. And the same case with the food products, one is food and one is tobacco; isn't that right?

A. Yes, sir.

X-Q. 71. And you wouldn't get them confused because you knew they would be different goods?

A. Yes, sir.

X-Q. 72. And you think any man that came in and asked for some Beech-Nut ham or bacon and let somebody hand him a package of Beech-Nut cigarettes and walk out, you would think he was crazy, wouldn't you?

A. Yes, sir.

Mr. Cavanagh: I guess that is all.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 73. Did you give this man any order at all?

A. No, sir, I did not.

R-D. Q. 74. I meant, of course, the man who came in to sell the cigarettes.

A. Yes, I understand.

Deposition closed.

Signature waived.

MISS M. SPRINGER, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name, residence, occupation and either your age or the fact that you are of legal age, as you prefer?

A. My name is M. Springer; my residence address is 750 30th street; I am a clerk; I am of legal age.

Q. 2. Miss Springer, in what store are you employed?

A. At C. H. Beese.

Q. 3. Where is it located?

A. 701 Murray avenue.

Q. 4. What kind of store is it?

A. Grocery store.

Q. 5. Who else is employed there?

A. Miss Heller.

Q. 6. I show you a package of Beech-Nut cigarettes, in this case known as Plaintiff's Exhibit No. 1. Have you ever seen these cigarettes before?

A. No, sir, I have not.

Q. 7. I do not mean this identical package, but a package like that.

A. No, I have only seen signs of the cigarettes.

Q. 8. Did you ever hear about Beech-Nut cigarettes before?

A. I saw them advertised in windows and on signs, and that is all.

Q. 9. Did anybody ever come into the store in which you are employed and try to sell Beech-Nut cigarettes?

A. Yes, sir, about two months ago.

Q. 10. Were you present when that man came in, and did you hear the ensuing conversation?

A. Yes, sir.

Q. 11. To whom did he talk?

A. Miss Heller.

Q. 12. Will you please state, as well as you can remember, what was said?

A. Well, the fellow came in and he let us understand he was selling Beech-Nut cigarettes and tobacco, and Miss Heller asked him where our friend was, Mr. Huebe, because we are on pretty good terms with him.

Q. 13. Who is Mr. Huebe?

A: A salesman who used to be the salesman for the Beech-Nut firm—and he said: "Well, won't I do?" and Miss Heller said: "Are you only taking the orders for cigarettes and tobacco?" And he said: "No, I will take the other order if you want me to," and while they were holding the conversation I didn't get any other impression but what he was from the same firm.

Q. 14. How long was he in the store talking to Miss Heller?

A. About an hour.

Q. 15. And when he went out of the store, Miss Springer, whose product did you think these Beech-Nut cigarettes were?

A. I took it for granted the same firm put up the peanut butter and other products.

Q. 16. How long did you continue to believe that these Beech-Nut cigarettes were the product of the Beech-Nut Packing Company?

A. Well, when these gentlemen came in (indicating) I didn't think it was, after I heard they said it was not the same firm.

Q. 17. After you heard what?

A. After they said it wasn't the same firm.

Q. 18. And did you say that the people who told you that, were the Beech-Nut people, who told you that the Beech-Nut Packing Company did not make the cigarettes?

A. I couldn't tell you that, I am sure.

Q. 19. Miss Springer, I wish you would describe, as well as you possibly can, the appearance of this man who came into the store and tried to sell these Beech-Nut cigarettes.

A. He was about medium size and he wore a dark overcoat, and I couldn't say for sure that he was dark, but I think he was.

Q. 20. Now, do you think you would recognize him if we could find——

A. I am almost sure I could.

Q. 21. Do you think you could pick him out if you saw him on the street?

A. No.

Q. 22. But if you ever do see him again and recognize

him, would you be willing to let Mr. Lewis, of the Beech-Nut Packing Company, know about it?

A. Yes, sir.

Mr. Hinton: That is all.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 23. You never sold tobacco, did you?

A. No, sir.

X-Q. 24. And you don't sell it in the store, do you?

A. No, sir.

X-Q. 25. Do you sell goods over the counter?

A. Yes.

X-Q. 26. Do you sell goods of the Beech-Nut Packing Company?

A. The food products, yes.

X-Q. 27. And chewing gum?

A. Yes, sir.

X-Q. 28. Candies?

A. No, not candies.

X-Q. 29. When this party that you said was attempting to sell the Beech-Nut cigarettes, or take an order for them, came into your store, did he give his name?

A. No, sir, I didn't hear it.

X-Q. 30. Did you take any part in the conversation at all?

A. Why, just when we were kidding along I kidded with them, but there was nothing I had to do about this conversation about the cigarettes.

X-Q. 31. You didn't take a package of the cigarettes in your hand and look at it, did you?

A. No, sir.

X-Q. 32. So you never read what was on the package at all?

A. No, sir.

X-Q. 33. And you have never read it up to the present time?

A. No, sir.

X-Q. 34. And you never took the trouble or interest to read what was on the advertisements, did you?

A. No, sir.

X-Q. 35. This man didn't give you any card, or leave any card at the store, that you know of?

A. No, sir.

X-Q. 36. Or did not produce any papers to identify him?

A. No, sir.

X-Q. 37. And he didn't say he was selling these cigarettes for the Beech-Nut Packing Company, did he?

A. No, sir, he didn't say it that way, but left us under the impression.

X-Q. 38. But that was simply the idea you gathered?

A. Yes.

X-Q. 39. He did offer to take other orders?

A. Yes, sir.

X-Q. 40. For food products from you for the Beech-Nut Packing Company, or to be filled by the Beech-Nut Packing Company; is that right?

A. Yes.

X-Q. 41. So that was one strong factor that led you to believe he was from the Beech-Nut Packing Company; is that right?

A. Yes, sir.

X-Q. 42. And in the ordinary course of events, if such an order had been sent to the Beech-Nut Packing Company you would expect to receive it due course of business, wouldn't you?

A. Yes.

X-Q. 43. Now, as far as you know, from your own personal knowledge, that man might have been from the Beech-Nut Packing Company, mightn't he?

A. I am sure I don't know whether he was or not.

X-Q. 44. But your impression was that he was, as you have said?

A. Yes, sir.

X-Q. 45. As far as you know today he might have been from the Beech-Nut Packing Company, might he not?

A. I don't know, he might have.

X-Q. 46. As far as you know, he might have been sent there by the Beech-Nut Packing Company just for this purpose, might he not?

A. He might have.

X-Q. 47. And seeing he couldn't sell cigarettes thought he would sell a little business on the side, or take an order for food products; is that right, to help the company along?

A. I suppose.

X-Q. 48. That is the way you would figure it?

A. Yes, sir.

X-Q. 49. In selling goods in the stores, if I came in and asked you for a package of Beech-Nut chewing gum, you wouldn't hand me out a package of those Beech-Nut cigarettes for gum, would you?

A. No, sir.

X-Q. 50. And you would think I was crazy if I took them, wouldn't you?

A. Yes, sir.

X-Q. 51. And if you wanted stick of gum at the store, Beech-Nut gum, and the man handed you a package of cigarettes, you would hand them back at him right away, wouldn't you?

A. Yes.

X-Q. 52. You would hand them back and say you didn't want them?

A. Yes, I would.

X-Q. 53. You wouldn't be confused for an instant between gum and cigarettes?

A. No, sir.

X-Q. 54. Or chewing tobacco?

A. No, sir.

X-Q. 55. And that is because they are an entirely different class of goods, aren't they?

A. Yes, sir.

By Mr. Cavanagh: That will be all.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 56. Miss Springer, you were present during this entire conversation with this man, which lasted half an hour. If there is any doubt in your mind that he deliberately led you to believe that these cigarettes were part of the Beech-Nut line, I wish you would tell us about it.

A. Why, I naturally think—if he thought we had the impression it was from the same firm he would tell us it was from another firm.

R-D. Q. 57. Is there any doubt in your mind that he misled you on that? Have you any doubt that is what he was doing?

A. Why, no, sir.

Mr. Hinton: That is all.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 58. You never had a tobacco man come in and try to sell you food products, did you?

A. No, sir.

R-X Q. 59. And you never had a tobacco man come in and ask you for an order for food products, did you?

A. No, sir.

Deposition closed.

Signature waived.



CARL W. NEMETZ, a witness produced on behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name, age, residence and occupation?

A. My name is Carl W. Nemetz; I am proprietor of a grocery store; age, twenty-eight; residence, 592 Jackson street.

Q. 2. Where is the store located?

A. 592 Jackson street, the same place. We live there in the rear.

Q. 3. Do you sell tobacco products in your store?

A. Yes, sir.

Q. 4. I show you a package of scrap tobacco which is in this case as Plaintiff's Exhibit No. 3. Have you ever sold this tobacco in your store?

A. Yes, sir.

Q. 5. How long have you sold it there?

A. Fourteen months.

Q. 6. During the time you sold this tobacco from fourteen months ago up to very recently, whose product did you think it was?

A. The Beech-Nut products, same as peanut butter and the likes of that.

Q. 7. What made you think that, do you know?

A. The name itself is the only reason.

Q. 8. Do you now believe this is a product of the Beech-Nut people?

A. Well, not since it has been explained to me, I don't.

Q. 9. How long ago was it explained to you to the contrary?

A. Oh, in the last month.

Q. 10. Do you know who explained it to you—whom he represented?

A. The Beech-Nut products.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 11. Do you handle the line of the Beech-Nut Packing Company's food products?

A. You mean peanut butter?

X-Q. 12. Yes.

A. Yes.

X-Q. 13. Do you handle the chewing gum?

A. Yes.

X-Q. 14. Candies?

A. No Beech-Nut candies, no.

X-Q. 15. You say you sell this Beech-Nut tobacco?

A. Yes, sir.

X-Q. 16. I show you this package of scrap tobacco (indicating).

A. Yes.

X-Q. 17. From whom do you buy this tobacco?

A. Stein Brothers.

X-Q. 18. What are they?

A. Tobacco jobbers.

X-Q. 19. You never bought any food products from this tobacco jobber, did you?

A. No, just chewing gum and candy and the likes of that.

X-Q. 20. But you never bought any Beech-Nut food products from them?

A. No.

X-Q. 21. Stein Brothers never told you this was made by the Beech-Nut Packing Company, did they? (Counsel indicates.)

A. No, sir.

X-Q. 22. Did you ever hear of P. Lorillard Company?

A. Never until Stein Brothers told me, that was after he dropped in the same day your representative was in. In fact, twenty minutes afterwards, we discussed the same thing over with him.

X-Q. 23. What did he tell you?

A. He told me that was made by that firm.

X-Q. 24. P. Lorillard Company?

A. The one made Turkish cigarettes. And in fact, I never knew who made them until he told me.

X-Q. 25. You never took the trouble to find who they were made by, did you?

A. No, sir, never.

X-Q. 26. You don't chew tobacco, do you?

A. No.

X-Q. 27. You never read that name "Lorillard's" on the package, did you?

A. I never took particular notice of it, no.

X-Q. 28. Do you do any buying for your concern?

A. I do it all.

X-Q. 29. You never bought any tobacco products from the Beech-Nut Packing Company, did you?

A. No, sir.

X-Q. 30. Either this scrap tobacco or cigarettes?

A. No kind of tobacco.

X-Q. 31. But you do buy the food products from the Beech-Nut Packing Company through their salesman?

A. Yes, also other jobbers of this town, not always from the salesman.

X-Q. 32. But you have bought from their salesman?

A. I think I placed one order through their salesman.

X-Q. 33. But you wouldn't order tobacco through that salesman, would you?

A. No, nor through any other one but Stein Brothers. I don't deal with any of the other jobbers, although they handle tobacco.

X-Q. 34. You mean other jobbers?

A. Other jobbers besides Stein Brothers, product jobbers.

X-Q. 35. Do you do any selling in your store?

A. Yes sir.

X-Q. 36. You never saw the product of the Beech-Nut Packing Company put up like a tobacco package, did you?

A. The package itself?

X-Q. 37. Yes.

A. No.

X-Q. 38. I am referring to this package, Plaintiff's Exhibit 3 (indicating same).

A. Not in that style of package, no.

X-Q. 39. If a person came into your store and wanted to buy food product such as bacon, or wanted to buy some chewing gum, you wouldn't hand him over a package of scrap tobacco for bacon or chewing gum, would you?

A. If he specified what?

X-Q. 40. If he specified bacon or chewing gum.

A. Oh, no, sure not.

X-Q. 41. If you did hand it to him, he would throw it back to you, wouldn't he?

A. I presume he would.

X-Q. 42. If you personally went into a store and asked for a package of chewing gum and a man handed you a package of scrap tobacco, you would hand it back to him, wouldn't you?

A. If I wanted the gum, sure, I would ask for gum.

X-Q. 43. If you asked for gum and he handed you tobacco, you wouldn't be confused, you would know you wanted gum?

A. Yes.

X-Q. 44. That is because the two are an entirely different class of goods?

A. Surely.

Mr. Cavanagh: That is all.

*Re-Direct Examination by Mr. Hinton.*

R-D. Q. 45. Where do you get your Beech-Nut gum?

A. Oh, from Stein Brothers and others.

R-D. Q. 46. They are the people you get your Beech-Nut scrap tobacco from?

A. Same people.

R-D. Q. 47. Do you know whether the wholesale grocers, or some of them, are handling tobacco?

A. Oh, yes; in fact, I think all of them do.

R-D. Q. 48. Do you know whether they sell this Beech-Nut scrap?

A. I don't know. The only reason I got Beech-Nut gum from Stein Brothers, at a time there it was pretty scarce to get and we used to gobble it up wherever we could get it from.

R-D. Q. 49. They are tobacco jobbers?

A. They are a tobacco and candy concern.

Mr. Hinton. That is all.

*Re-Cross Examination by Mr. Cavanagh.*

R-X Q. 50. Their business isn't confined exclusively to tobacco?

A. No, they are the same as all other tobacco concerns in this town; every one of them carries gum and candy.

R-X Q. 51. You mean the jobbers?

A. Yes, tobacco jobbers; they carry it as a side line.

By Mr. Cavanagh: That is all.

Deposition closed.

Signature waived.

E. J. McFADZEEN, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Please state your name, age, residence and occupation.

A. My name is E. J. McFadzeen; age is twenty-three; residence, 643 72nd avenue, West Allis, Wisconsin; occupation, grocer.

Q. 2. Where is your grocery store located?

A. West Allis. Do you want the address?

Q. 2. Yes.

A. 6211-13 Greenfield avenue.

Q. 4. Do you smoke cigarettes?

A. Yes, sir.

Q. 5. What kind do you customarily smoke?

A. Lucky Strike.

Q. 6. Have you bought any other brand than Lucky Strike recently?

A. A package of Beach-Nat cigarettes.

Q. 7. Are those Beach-Nat cigarettes that you bought similar to this package I now show you, being Plaintiff's Exhibit 1 in this case?

A. Yes, sir.

Q. 8. Why did you buy those Beach-Nat cigarettes instead of Lucky Strike cigarettes?

A. Why, I thought they would be good cigarettes, because I know Beach-Nat products are good, the ones I sell, anyhow.

Q. 9. Did you believe they were a product of the Beach-Nat Packing Company?

A. Yes, sir.

Q. 10. Did you smoke this package of Beech-Nut cigarettes that you bought?

A. Some of them, not all of them.

Q. 11. Was your expectation as to the quality of the cigarettes realized?

A. No.

Q. 12. How long did you continue to believe that these cigarettes were a product of the Beech-Nut Packing Company?

A. Until a representative of the Beech-Nut Packing Company came in the store one day.

Q. 13. Did he tell you they were not?

A. Yes.

Q. 14. In the intervening period between the time that you bought the package of Beech-Nut cigarettes and smoked some of them and the time that the Beech-Nut representative came into your store, had you seen these Beech-Nut cigarettes advertised by posters in windows and on display in stores?

A. Yes, sir.

Q. 15. Did you ever ask anybody who made these cigarettes?

A. Yes, I did.

Q. 16. Who did you ask, do you remember?

A. A salesman came in the store one day and offered me one.

Q. 17. And what did you ask him?

A. I asked him who made it, and jokingly he said: "We do," and then I said: "No, seriously, do you know who makes them?" and he said, "Why, yes, Beech-Nut, of course."

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 18. Do you sell cigarettes and tobacco in your store?

A. Tobacco, not cigarettes.

X-Q. 19. What kind of tobacco do you sell?

A. Oh, Niggerhair and a little plug—Niggerhair, Plowboy, and a little plug.

X-Q. 20. Do you sell Beech-Nut scrap?

A. No.

X-Q. 21. Did you ever look at a package of Beech-Nut scrap?

A. Not closely. I would know if I saw it, I would know what it was, of course.

X-Q. 22. You never read any of the wording on it, did you?

A. No.

X-Q. 23. When you bought this package of Beech-Nut cigarettes that you related you purchased, did you read any of the printed matter on it?

A. No, not when I bought it, I paid no attention to it. I saw what I thought was the "Beech-Nut" trade-mark.

X-Q. 24. You have heard of P. Lorillard Company?

A. Yes.

X-Q. 25. You know they are large tobacco manufacturers?

A. Yes.

X-Q. 26. If you had seen that name "P. Lorillard Company" on that package of Beech-Nut cigarettes you would have known it was Lorillard's cigarettes?

A. Yes.

X-Q. 27. Same as you would know the Lucky Strike was the American Tobacco Company's cigarettes?

A. Yes, sir.

X-Q. 28. But you didn't pay any attention to it and didn't take the trouble to read it?



A. That is right, I just took it for granted it was a Beech-Nut product.

X-Q. 29. Now, this salesman that you said told you—Who did he say made the cigarettes when you asked him?

A. He said, "We do." He was a coffee salesman.

X-Q. 30. He was a coffee salesman?

A. Yes.

X-Q. 31. He was just joking?

A. Yes.

X-Q. 32. Then he told you who made it? Who did he say?

A. I asked him: "Really, do you know who makes them?" He said: "Sure, Beech-Nut."

X-Q. 33. Is that all he said, the word "Beech-Nut"?

A. "Beech-Nut people," something to that effect, "Beech-Nut people, of course."

X-Q. 34. But he was a coffee salesman?

A. Yes, coffee, peanut butter, tea, etc.

X-Q. 35. Did he pull out a package when he handed you the cigarette?

A. Yes.

X-Q. 36. Neither one of you took the trouble to look at it to see who made it?

A. No, I never did.

X-Q. 37. If you had taken the trouble to look at these cigarettes and saw the name "P. Lorillard Company," you would have known it was not Beech-Nut, wouldn't you?

A. Yes.

X-Q. 38. You say that you didn't like this Beech-Nut cigarette when you purchased it, but you smoke the Lucky Strike. As one who smokes cigarettes you know that different smokers have different tastes, don't you?

A. Yes, sir.

X-Q. 39. And that what might appeal to you in one

brand of cigarettes would not appeal to another man, isn't that right?

A. Certainly.

X-Q. 40. You never knew the Beech-Nut Packing Company to put out any tobacco products, did you?

A. No, never knew they did.

X-Q. 41. Do you do the buying for your store?

A. I have in the past three or four months.

X-Q. 42. You never bought any tobacco products or cigarettes or scrap tobacco from the Beech-Nut Packing Company?

A. No.

X-Q. 43. And your salesman never told you they had any tobacco or cigarettes for sale, did he?

A. No, sir.

X-Q. 44. You never yourself bought or ordered from the Beech-Nut Packing Company any goods which were packaged like a package of cigarettes, did you?

A. No, sir.

X-Q. 45. And likewise like that package of scrap tobacco, you never bought any goods put up like a package of scrap tobacco?

A. No, sir.

X-Q. 46. Now, do you sell Beech-Nut chewing gum?

A. When I can get it, yes.

X-Q. 47. And you sell Beech-Nut food products?

A. Peanut butter and that stuff.

X-Q. 48. If a customer came in your store and asked you for a jar of peanut butter, or package of chewing gum, you wouldn't hand him out a package of cigarettes or a package of tobacco for the peanut butter or chewing gum, would you?

A. Why, no. What do you mean? If he came in and asked for peanut butter?

X-Q. 49. Yes.

A. No, certainly not.

X-Q. 50. An entirely different class of goods, aren't they?

A. Altogether.

X-Q. 51. And you yourself wouldn't be deceived into taking a food product or chewing gum for a package of cigarettes, would you?

A. No, sir.

X-Q. 52. Or a package of scrap tobacco?

A. No.

Deposition closed.

Signature waived.

WILLIAM C. WEIGEL, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Please state your name, age, residence and occupation.

A. My name is William C. Weigel; thirty-three years old; retail grocer.

Q. 2. Where is your store located?

A. 810 Wells Street, Milwaukee, Wisconsin.

Q. 3. Where do you live, Mr. Weigel?

A. At the same address, apartment 10.

Q. 4. Do you sell tobacco products in your store?

A. Yes, sir.

Q. 5. I show you a package of Beech-Nut scrap tobacco, being Plaintiff's Exhibit 1 in this case. Have you sold this tobacco in your store?

A. Yes, sir.

Q. 6. How long have you sold it?

A. Oh, around two years, somewhere around there.

Q. 7. Did the man come and sell you this tobacco, put it in your stores?

A. Yes.

Q. 8. I wish you would tell me, if you can remember, what was said on that occasion when he came and put the tobacco in the store.

A. I don't know whether I asked him directly, or whether he told me, but I was given to understand that this was a label that was only permitted on the very best products and was leased by the different companies that put out this product.

Q. 9. Did you order tobacco from this man?

A. Yes, I bought it right from the man himself, I believe they carried it around with them, if I am not mistaken now.

Q. 10. You paid him cash for it?

A. Yes, sir.

Q. 11. That is your best recollection?

A. To my best recollection.

Q. 12. Or did you order it from him?

A. No, I am pretty sure he left it, he carried it right with him, that is as far as I remember it.

Q. 13. Now, whose product did you think this was, Mr. Weigel, or who did you think was responsible for the product?

A. I naturally supposed that the Beech-Nut label was owned by some man or some company and then leased out to the people that put it out in a very high class product.

Q. 14. How long did you continue to believe that?

A. Until about two or three or four weeks ago.

Q. 15. And by whom were you then advised to the contrary, do you remember?

A. By the Beech-Nut gum and dried beef people, Beech-Nut Packing Company, I guess it is.

Q. 16. Do you sell Beech-Nut chewing gum in your store?

A. Yes.

Q. 17. Do you sell other Beech-Nut products?

A. Dried beef.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 18. From whom did you buy these Beech-Nut products?

A. O. R. Pieper Company, wholesale grocers.

X-Q. 19. You don't buy from the agents?

A. Yes, buy through the jobbers.

X-Q. 20. The agent comes first and takes the order?

A. Yes.

X-Q. 21. You give the order to the Beech-Nut agent?

A. Yes.

X-Q. 22. Do you know who he is?

A. Representing the Beech-Nut Packing Company.

X-Q. 23. But you know him when he comes in the store, the Beech-Nut man?

A. Yes.

X-Q. 24. You didn't buy this tobacco from that man, did you?

A. No.

X-Q. 25. How often have you bought this tobacco?

A. Well, I only bought that once from the man, I have bought it since from the wholesale jobbing house.

X-Q. 26. That man didn't tell you that that tobacco was made by the Beech-Nut Packing Company, did he?

A. He told me—No, he didn't, he told me it was a label, he explained to me was the label only the very best products were allowed to use.

X-Q. 27. Who was this man?

A. I don't know. As far as I remember, he was a

specialty man, or maybe he was a tobacco man, because I know the first order I bought direct from him and paid him, he carried it with him, so I supposed he was the tobacco man.

X-Q. 28. You don't know his name, do you?

A. No.

X-Q. 29. Or what concern he represented?

A. No, sir.

X-Q. 30. Did you ever take the trouble to read any of the writing or printing on the package (indicating)?

A. I don't recollect. That is, I couldn't say what it said on there.

X-Q. 31. You notice the name "Lorillard's" on the package?

A. Yes.

X-Q. 32. Did you ever hear of P. Lorillard Company, the tobacco people?

A. Yes.

X-Q. 33. They are a large tobacco concern?

A. Yes.

X-Q. 34. Those jobbers you now get the Beech-Nut tobacco from, they did not tell you it was from the Beech-Nut Packing Company, did they?

A. No, sir.

X-Q. 35. And none of the agents told you it was made by the Beech-Nut Packing Company, did they?

A. No, sir.

X-Q. 36. You never knew the Beech-Nut Packing Company to put out a package of tobacco like this (indicating), did you?

A. No.

X-Q. 37. You never knew them to sell tobacco at all, did you?

A. No.

X-Q. 38. Is this tobacco a good seller, for scrap tobacco?

A. It is a pretty good seller.

X-Q. 39. You continued to buy it right along?

A. Yes, that is the only reason I remember it, it sells pretty good. I don't handle much tobacco.

X-Q. 40. From what you know of the Lorillard Company, that is a good responsible tobacco concern, isn't it?

A. Oh, yes.

X-Q. 41. If you went into a store and you wanted to buy some chewing gum, would you be fooled into taking a package of this scrap tobacco in place of the chewing gum?

A. I don't think so.

X-Q. 42. An entirely different class of goods, aren't they?

A. Why, certainly.

Mr. Cavanagh: That is all.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 43. What jobber did you buy this tobacco from?

A. This tobacco I bought from the Grocers Wholesale Company, now I am a member of that company.

R-D. Q. 44. That is a wholesale grocery company, of course?

A. Yes, co-operative company.

Deposition closed.

Signature waived.

HENRY W. FOOTE, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name, age, residence and occupation?

A. Henry W. Foote; I have a room at 220 22nd street.

Q. 2. What is your occupation, Mr. Foote?

A. Delicatessen, I call it a grocery store.

Q. 3. Do you mind saying how old are you?

A. Sure, I am 59.

Q. 4. Mr. Foote, where is your store located?

A. 2116 Wells street.

Q. 5. Mr. Foote, I show you a package of Beech-Nut cigarettes, in this case as Plaintiff's Exhibit 1. Did you put any of these cigarettes in your store and sell them?

A. I put in one box of them, yes.

Q. 6. Why did you put them in?

A. When I bought them I supposed they were made by the Beech-Nut Company first.

Q. 7. Is that the reason you put them in?

A. Why, yes, that was the reason.

Q. 8. How long did you continue to believe they were made by the Beech-Nut Packing Company?

A. Oh, why, let's see, it is hard to tell that just exactly.

Q. 9. Just approximately.

A. A week or ten days, maybe, in that neighborhood. It is only a short time.

Q. 10. How were you first advised they were not made by the Beech-Nut Company?

A. Let me think how that was exactly. Now, I couldn't just say the gentleman, whether that was the man, the



agent, as I told you, for this company here—I think he is the gentleman told me, but I couldn't just say positively as to that. I think so.

Q. 11. Did he do anything beside tell you they were not made by the Beech-Nut Company?

A. No.

Q. 12. Did he cause you in any way to compare labels?

A. Well, he showed me the label of the gum and this here (indicating), that is all.

Q. 13. Did he point out the difference between the two labels, to you?

A. Yes.

Q. 14. What would you think about those two labels before he pointed out the difference to you?

A. Well, as I said before, I thought, until he explained to me, I supposed they were made by the Beech-Nut Company, naturally, because then I looked at it I thought sure it was the product of the Beech-Nut goods, and as he explained, he showed me these different ones here, I saw it was a little bit different, of course.

Q. 15. What would you have said about those two labels before he pointed it out to you? Would you have said they were different or the same, or what?

A. I couldn't have said anything, because I didn't take notice particularly to see. I didn't take notice, that is the idea.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 16. You never took the trouble to read the printed matter when you bought the cigarettes, did you?

A. No.

X-Q. 17. Did you ever hear of the P. Lorillard Company, the tobacco people?

A. I have heard of them.

X-Q. 18. You would have seen that name on there if you had looked at it (indicating)?

A. When I got the cigarettes the agent came to ask me about the "Beech-Nut," I guess he was a good old friend of mine, from this Lewis-Leidersdorf Company, used to be Fay Lewis & Company, he wanted to know if I wanted some new cigarettes. I said: "What?" He said: "Beech-Nut." You would naturally think it was the Beech-Nut.

X-Q. 19. But he didn't say it was made by the Beech-Nut Packing Company?

A. No.

X-Q. 20. Now, you still handle these Beech-Nut cigarettes?

A. No, sir.

X-Q. 21. You just got one carton?

A. That was all.

X-Q. 22. Do you handle much tobacco products at all?

A. Quite a little, yes, sir.

X-Q. 23. Scrap tobacco?

A. No, sir, not scrap, Niggerhair, Tuxedo and those.

X-Q. 24. How many people work in your store?

A. Only myself and a young lady.

X-Q. 25. And your principal business is groceries and delicatessen?

A. Yes, sir.

X-Q. 26. And the tobacco is a side line?

A. Well, I don't know whether you would call it that or not; I sell it when I get a chance.

X-Q. 27. You don't sell as much tobacco as groceries and delicatessen?

A. Oh, no.

X-Q. 28. When you first bought the cigarettes you didn't take the trouble to look at the cigarettes to see if it was like a Beech-Nut package?

A. No, he handed it to me, and I didn't look.

X-Q. 29. Simply the word "Beech-Nut"?

A. That was all.

X-Q. 30. Did you buy any goods from the Beech-Nut Packing Company?

A. You mean the Beech-Nut? No, I generally buy through the candy man.

X-Q. 31. But you handle the Beech-Nut Packing Company's food products?

A. Some of it.

X-Q. 32. Handle chewing gum?

A. Yes.

X-Q. 33. You never knew of the Beech-Nut Packing Company putting up cigarette packages or anything like that?

A. No, I never knew it.

X-Q. 34. If you went into a store and you wanted a package of chewing gum, could you be fooled by the dealer into taking a package of cigarettes instead of chewing gum?

A. Buy the cigarettes instead of gum?

X-Q. 35. Yes, if you asked for gum.

A. No, I shouldn't think so. I think I am pretty level-headed.

X-Q. 36. You would think a person was crazy if they took gum when they wanted cigarettes, or took cigarettes when they wanted gum?

A. Not only crazy, but I should think he didn't know what he wanted, hardly.

X-Q. 37. And if I came into your store and asked for a package of cigarettes, you wouldn't hand me a package of gum, would you?

A. I don't think I would hardly do that.

X-Q. 38. That is because they are an entirely different class of goods, isn't it?

A. Yes.

X-Q. 39. As I understand it, you don't know who the first agent was sold you the cigarettes?

A. I don't know his name, but he is coming to me two years, or pretty near that, but after that—

X-Q. 40. He is a jobber, is he?

A. No, he works for this—used to be Fay Lewis, now Lewis-Leidersdorf.

X-Q. 41. What kind of business are they in?

A. Tobacco men.

X-Q. 42. And the man who explained to you and showed you the differences in the labels was a tobacco man, wasn't he, that you spoke of?

A. He was, if I am not mistaken, the man supposed to be from the factory of this concern, I think.

X-Q. 43. You mean the P. Lorillard Company, cigarette man?

A. Yes.

X-Q. 44. He wasn't a Beech-Nut Packing Company man?

A. No.

X-Q. 45. How long ago was it you bought this carton, approximately?

A. I will say it was a week ago Tuesday, I should think, just about, I would think. Now, it might be Tuesday, I couldn't say.

X-Q. 46. It was within a month?

A. Oh, yes.

X-Q. 47. It was just a short while ago?

A. Yes, that is all.

Deposition closed.

Signature waived.

E. R. LEWIS, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Please state your name, age, residence and occupation.

A. My name is E. R. Lewis; 30 years old last October 9th; live at 827 27th street, Milwaukee; work as division representative for the Beech-Nut Packing Company.

Q. 2. What territory do you cover?

A. State of Wisconsin, and the Northern Peninsula of Michigan.

Q. 3. How long have you been division manager for the Beech-Nut Packing Company in this territory?

A. Since February 19, 1919.

Q. 4. How long have Beech-Nut cigarettes similar to Plaintiff's Exhibit 1, which I now show you, been on the market and advertised and displayed in this territory, as far as you know?

A. A comparatively short time, I should say about a month or month and a half or two months.

Q. 5. Since these cigarettes have appeared here, have you heard any comments, remarks and inquiries about these cigarettes, and if so, what has been the character of these comments, remarks and inquiries?

A. I have had some inquiries, I should say two or three hundred inquiries, and they have been such as, "Are the cigarettes selling?" and "Give me a sample of cigarettes," and such similar inquiries.

Q. 6. Give me a conservative estimate of the number of times you heard this kind of comment, remark and inquiry.

A. Two or three hundred.

Q. 7. Can you give me any specific instances? I want

only instances where you can state definitely the name of the person who made the remark and definitely, just exactly what he said.

A. Why, the first one that comes to my mind was Dr. O'Malley, in the Public Service Building, asked me how the cigarettes were selling. He said he saw one of the signs. And Joe Afferbal, who is located in the Meyer Building, 288 East Water street, came over and said: "Give me a sample of cigarettes," and a fellow by the name of Ernie Sprinkmann, located on Water street, asked me if I was going to put on a new salesman selling cigarettes. And various others.

Q. 8. Could you give other instances of this character?

A. Yes, sir.

Q. 9. Were you present yesterday when Mr. and Mrs. Petersen were testifying about the attempt made to sell some Beech-Nut cigarettes to them in Manitowoc, Wisconsin?

A. I came in when you called for me at the end there. I didn't hear it all.

Q. 10. When did you first, directly or indirectly, hear about this incident?

A. When Mr. Wesling told you and I together downstairs in the lobby last Friday.

Q. 11. You mean the lobby of the Wisconsin Hotel here in Milwaukee, Wisconsin?

A. Yes.

Q. 12. That would be a week ago yesterday?

A. That would be a week ago yesterday, yes, sir.

Q. 13. Did you subsequently go to Manitowoc?

A. Yes, sir.

Q. 14. And did you see Mr. and Mrs. Petersen up there?

A. I did.

Q. 15. Has any other Beech-Nut representative, to your knowledge, been in Manitowoc since last Friday?

A. No, sir.

Q. 16. Or since the date of Mr. Wesling's previous call there?

A. No, sir.

Q. 17. Now, are you familiar with this product "Beech-Nut scrap tobacco," Plaintiff's Exhibit No. 3, which I show you?

A. Yes, sir.

Q. 18. Will you please state whether or not there has been, since you have been in charge of this territory, a drive on this Beech-Nut scrap?

Mr. Cavanagh: The question is objected to as leading, immaterial and irrelevant to the question at issue.

The Witness: Yes, sir.

Mr. Hinton: Q. 19. How many men, to your knowledge, were working on this scrap, and where did you say they worked?

A. There were, as I recall it, about six men in the crew, along with the boss, probably six or eight men, and I saw them working in Appleton and Green Bay in particular.

Q. 20. State whether or not they worked in Milwaukee too, to your knowledge.

A. Yes, they did. They worked the whole State of Wisconsin.

Q. 21. And about when was that, Mr. Lewis?

A. About two years ago.

Q. 22. Have you since that date heard any comments, remarks and inquiries about Beech-Nut scrap?

A. Yes, sir.

Q. 23. What was the character of these comments, remarks and inquiries?

A. Practically the same as on the cigarettes, just the same as on the cigarettes.

Q. 24. Could you give me a particular illustrative incident of the kind of comment, remark and inquiry you heard about the Beech-Nut scrap tobacco?

A. Mr. Schwarting was buyer of the Gazette Candy Company at Green Bay, and he asked me how the scrap tobacco was going. I could give you others, I can't think of them off-hand.

Q. 25. About how many comments, remarks and inquiries of this character about the scrap tobacco do you think you have heard?

A. Probably about seventy-five to one hundred.

Q. 25a. Mr. Lewis, what trade do you call on?

A. The jobbing trade mostly.

Q. 26. That is, the wholesale grocers?

A. Wholesale tobacco dealers, confectioners, druggists and all jobbers that job our product.

Q. 27. Do you come into contact with the retailers?

A. Not as much as some of the other boys that work under me. I do come in contact with the retailer, but not as much as some of the others.

Q. 28. Are you acquainted with Mr. Goldstein?

A. Yes, sir.

Q. 29. Who is he?

A. As I understand it from him, he is the division representative for P. Lorillard Company in this territory, in the cigarette department.

Q. 30. Have you heard Mr. Goldstein make any statements about the Beech-Nut cigarettes?

A. Yes, sir.

Q. 31. What did he say?

A. I have heard him say on two or three different occasions that Beech-Nut cigarettes were like all other Beech-Nut products, they were quality goods and good sellers.



Q. 32. Was anybody else present when you heard Mr. Goldstein make that statement?

A. Yes, sir.

Q. 33. Who was it?

A. Mr. Smith was present on one occasion, and Mr. Atkinson was present on another occasion.

Q. 34. What is Mr. Smith's full name, do you know—or, who is he?

A. Mr. C. W. Smith. He is the Milwaukee, Wisconsin, representative for Killian & Clark, food products, New York City.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 35. How long have you been in charge of this Wisconsin territory, Mr. Lewis?

A. Since February, 1919.

X-Q. 36. Did you take orders for the Beech-Nut Packing Company's goods?

A. Yes, sir.

X-Q. 37. And I presume what you take orders for is food products and candy and chewing gum and ginger ale?

A. Yes, sir.

X-Q. 38. All of those products that you take orders for have that Beech-Nut label on like this bacon label, Defendant's Cross Exhibit 8 (indicating same)?

A. Yes, sir.

X-Q. 39. You do not sell tobacco products with Beech-Nut Packing Company, do you?

A. No, sir.

X-Q. 40. Did you ever sell any tobacco products for the Beech-Nut Packing Company?

A. No, sir.

X-Q. 41. Did you ever take an order for any tobacco products for the Beech-Nut Packing Company?

A. No, sir.

X-Q. 42. Did you ever sell for the Beech-Nut Packing Company any goods packaged like that package of Beech-Nut cigarettes, Exhibit 1?

A. No, sir.

X-Q. 43. And likewise, did you ever sell any goods packaged like that scrap tobacco?

A. No, sir.

X-Q. 44. Being Plaintiff's Exhibit No. 3. How long have you personally known this Beech-Nut scrap tobacco like Plaintiff's Exhibit No. 3 to be on sale or in stores in this territory?

A. Why, since about three years, about three years ago, in this territory.

X-Q. 45. In other words, since about the time, or shortly after you took charge of this territory?

A. Well, let us see, I came here February, 1919, that is pretty near three years ago.

X-Q. 46. Well, we won't quarrel over the length of time, it is between two and three years.

A. In other words, when I first came out here I don't believe there was any Beech-Nut scrap tobacco sold in this market.

X-Q. 47. But it was very shortly after you came out here that you found it in this market; is that right?

A. To my knowledge there wasn't any Beech-Nut tobacco sold in this market until they put their crew on.

X-Q. 48. And that was about two years ago.

A. Yes, sir.

X-Q. 49. And you have been in charge of this territory over two years, but not quite three years?

A. Yes sir.

X-Q. 50. How long have you been with the Beech-Nut Packing Company?

A. Since the Friday after Labor Day, 1914.

X-Q. 51. And in what territory were you located just before you came here?

A. Pittsburgh.

X-Q. 52. You worked the Pittsburgh territory?

A. Yes, sir.

X-Q. 53. Did you see this Beech-Nut scrap on the market in Pittsburgh?

A. Yes, sir.

X-Q. 54. How long had you known it to be on the market there?

A. I was working—I suppose you want approximately the date?

X-Q. 55. Yes, approximately.

A. Well, let us see, in the latter part of 1916, as I recall it, I was in Lewistown, Pa., and at that time there was a crew introducing Beech-Nut scrap tobacco.

X-Q. 56. So you have known of this Lorillard Beech-Nut scrap tobacco since about 1916, haven't you?

A. Yes, sir.

X-Q. 57. And you were not any stranger to it when you came into this territory?

A. No, sir.

X-Q. 58. Now, did you ever tell anybody that that scrap tobacco was put out by the Beech-Nut Packing Company?

A. No, sir.

X-Q. 59. Did you ever tell anybody it was put out by Lorillard?

A. Yes, sir.

X-Q. 60. Did you ever hear any Lorillard man say that Beech-Nut tobacco was put out by the Beech-Nut Packing Company?

A. No, sir.

X-Q. 61. And I suppose the same applies to the cigarettes?

A. Yes, sir.

X-Q. 62. That is, you never heard a Lorillard man say that?

A. Personally I never heard it said directly to me, *no, sir*.

X-Q. 63. You were not in the store of Petersen Brothers at Manitowoc when this mysterious person who was supposed to be a tobacco salesman came in and tried to make the sales of tobacco?

A. No, sir.

X-Q. 64. So you didn't see this person either, did you?

A. No, sir.

X-Q. 65. You say it was about a couple of years ago you saw a crew introducing this tobacco—Lorillard's Beech-Nut scrap tobacco—around Green Bay, in Wisconsin?

A. Yes, sir.

X-Q. 66. Did you ever have any talk with those fellows?

A. Why, not about business.

X-Q. 67. But you knew there was a tobacco crew, didn't you?

A. Yes sir.

X-Q. 68. They were not introducing any food products?

A. No.

X-Q. 69. They were not representing themselves to be from the Beech-Nut Packing Company?

A. Not to my direct knowledge.

X-Q. 70. That is what I mean, so far as you know.

A. So far as I know directly.

X-Q. 71. How long have you known that there has been a controversy on between the Lorillard Company and the Beech-Nut Packing Company over this Beech-Nut tobacco and cigarette question?

A. Why, about two years, about the time this crew came on there.

X-Q. 72. And how long have you known there has been a controversy over the cigarettes? That is you knew there was a case pending in the Patent Office regarding this cigarette, didn't you?

A. I don't know much about the particulars.

X-Q. 73. I don't mean the particulars. You knew there was some controversy pending in the Patent Office?

A. Yes.

X-Q. 74. And you have known that for some time, haven't you?

A. I don't know how long I have known it, but not so awful long.

X-Q. 75. Well, just approximately.

A. About the patents pending? I haven't known that very long.

X-Q. 76. Well, how long have you known the Beech-Nut cigarette to be in this territory?

A. Oh, that is just comparatively a short time, I know.

X-Q. 77. A couple of months?

A. Yes.

X-Q. 78. But you knew before it ever came into this territory that the P. Lorillard Company had out a cigarette, didn't you?

A. Yes.

X-Q. 79. And you knew they were having some difficulty with the Beech-Nut Packing Company about that cigarette, didn't you?

A. Yes, sir.

X-Q. 80. And you knew there was some sort of Patent Office proceedings pending in connection with it?

A. Yes, sir.

X-Q. 81. Were you asked by the Beech-Nut Packing Company, or some of its representatives, to make any investigations regarding the Lorillard scrap tobacco and the Lorillard Beech-Nut cigarette in this territory and obtain whatever evidence you could for this state?

A. Yes, sir.

X-Q. 82. And you have been going around interviewing the trade, have you not?

A. Well, I will tell you frankly, we did not, any of us, put ourselves out to get the information. We were asked to make a note of any information that may come to us. We were not particularly asked to go out and ask for the information.

X-Q. 83. But you have gone around and visited the different stores engaged with this matter, have you not?

A. Yes, sir. I have visited the principal stores after some one else had reported that had happened.

X-Q. 84. And you instructed the men under you to keep an eye out, and pick up whatever information they could, didn't you?

A. Yes, sir.

X-Q. 85. You never knew personally of any grocer or dealer to sell to a customer either the scrap tobacco or cigarette and tell him it was made by the Beech-Nut Packing Company, did you?

A. I did not.

X-Q. 86. You never knew a man to hand that over the counter to a customer and say: "That is made by the Beech-Nut Packing Company," did you, in those words?

A. No.

X-Q. 87. You yourself know that that tobacco is made by P. Lorillard Company?

A. Yes, sir.

X-Q. 88. And you also knew the cigarettes to be made by the Lorillard people?

A. Yes, sir.

X-Q. 89. You wouldn't be deceived as to who it was made by?

A. No, sir.

X-Q. 90. In other words, you know your own products the same as you would know your own children, wouldn't you?

A. Yes, sir.

X-Q. 91. Yesterday when Mr. and Mrs. Petersen were testifying, you were not in this room during all of that examination, were you?

A. No, sir.

X-Q. 92. You were just called in at the end to stand up?

A. To be identified.

X-Q. 93. —see if they could identify you?

A. Yes, sir.

X-Q. 94. As I recollect it, they could not identify you, could they?

A. Yes, sir, they identified me all right.

X-Q. 95. Now, who did you say this Lorillard man was here that you had some talk with? Mr. Goldstein, is that it?

A. Yes, sir, either Mr. Goldstein or Mr. Goldstine.

X-Q. 96. Where did you meet Mr. Goldstein?

A. The first time?

X-Q. 97. Yes, the first time.

A. I have known him ever since he has been here, I guess. He has only been here since the first of this year.

X-Q. 98. Where is he located?

A. Where is his office here?

X-Q. 99. Yes.

A. I don't know.

X-Q. 100. What line of business is he in?

A. Tobacco.

X-Q. 101. Do you know who he represents?

A. Yes, sir.

X-Q. 102. Who?

A. P. Lorillard Company.

X-Q. 103. But you don't know where his office is?

A. I never took the trouble to look it up.

X-Q. 104. Do you know where the Lorillard representative is in this district at all? His address?

A. The street address?

X-Q. 105. Yes.

A. He lives out on Auer avenue.

X-Q. 106. Do you know where his business address is?

A. No, sir, I never had occasion to look it up.

X-Q. 107. You say you met him when he first came in this territory?

A. Shortly after he first came.

X-Q. 108. And when was that?

A. Since the first of this year.

X-Q. 109. Now, how did you happen to have any conversation with this Mr. Goldstein about these Beech-Nut tobacco products?

A. Well, as I say, I met Mr. Goldstein and he knows me and I know him; we met the first time in one of the tobacco jobber's places of business, and when you are around you are more or less apt to start to talk about various things, you don't know just how they happen to come about. Do you want me to give the particulars about the time that he made the statement?

X-Q. 110. Where was it you met him? In whose place—when you first met him?

A. When I first met him?

X-Q. 111. In this tobacco jobber's store? When was that?



A. It was along about the first of this year.

X-Q. 112. whose store was that?

A. A. S. Goodrich, I should say.

X-Q. 113. Did somebody introduce you to Mr. Goldstein?

A. I think they did.

X-Q. 114. You were told that he was the Lorillard man?

A. Yes, sir.

X-Q. 115. And he was told you were the Beech-Nut man?

A. Yes, sir.

X-Q. 116. So you got each other's status down right at the start?

A. Yes, sir.

X-Q. 117. That is, that you knew thereafter that he was the Lorillard man and he knew you were the Beech-Nut man?

A. Yes, sir.

X-Q. 118. All right, let us start from there. On that occasion, did you have any conversation about this Beech-Nut tobacco?

A. Not about Beech-Nut scrap, no, sir. On that occasion he told me about their selling Beech-Nut cigarettes in the east.

X-Q. 119. And when was that that you mention in Goodrich's?

A. The fore part of this year.

X-Q. 120. And when did this conversation take place with Mr. Goldstein, at which you said that Mr. Smith was present and when he discussed the Beech-Nut cigarette?

A. About three or four weeks ago, the same time the cigarettes were out.

X-Q. 121. So that about nine months or so elapsed, ap-

proximately, between the time you first met Mr. Goldstein and the time you had this conversation in the presence of Mr. Smith?

A. Yes.

X-Q. 122. Now, in that period of about nine months, more or less, how often did you meet Mr. Goldstein?

A. Oh, quite often, quite a few times.

X-Q. 123. Just give me an approximate date. Was it five times?

A. I was going to say it would average almost once a week, but I don't think that much, maybe once in two weeks.

X-Q. 124. And it was very frequent?

A. Yes, very frequent. Saw him around the trade and around the street, and would say "Hello" to him.

X-Q. 125. Would you meet him in different towns?

A. The only other town I ever happened to meet him in was Kenosha.

X-Q. 126. Most times you met him here in Milwaukee?

A. Yes, sir.

X-Q. 127. So you both knew each other very well, as a matter of fact?

A. Well, as well as you and I know each other.

X-Q. 128. As well as two business men would know each other?

A. Yes, we didn't hobnob together.

X-Q. 129. Each knew which concern the other represented?

A. Yes, sir.

X-Q. 130. And so far as your business relations went, you were on a friendly basis?

A. Yes, sir.

X-Q. 131. Greeted each other when you met in concerns?

A. Yes.

X-Q. 132. So when you had this conversation about three weeks ago in the store in the presence of Mr. Smith, about the Beech-Nut cigarette, there wasn't the slightest misunderstanding in either your mind as to who Mr. Goldstein represented, and you think there wasn't any in his, is that correct?

A. Yes.

X-Q. 133. He knew you were the Beech-Nut man?

A. Yes, sir.

X-Q. 134. And this conversation you had in the presence of Mr. Smith was a friendly one, wasn't it, with Mr. Goldstein?

A. Yes.

X-Q. 135. He didn't say at that conversation these cigarettes were put out by the Beech-Nut Packing Company, did he?

A. Not in so many words.

X-Q. 136. He didn't say it, did he?

A. Not in those words, no, sir.

X-Q. 137. Did he say it at all?

A. No, sir.

X-Q. 138. And if he did, you would say he was crazy if he said they were put out by your concern, when you were there?

A. Yes, sir, I certainly would.

X-Q. 139. And immediately you would have corrected the impression he would have labored under, if he had so stated, wouldn't you?

A. Yes, sir.

X-Q. 140. And in connection with the cigarettes he didn't say the word "Beech-Nut Packing Company" at all, did he?

A. Not the word "Beech-Nut Packing Company."

X-Q. 141. So you could not possibly have been fooled, could you, as to who put out those cigarettes?

A. No, not I.

X-Q. 142. You never heard Mr. Goldstein tell anybody those cigarettes were put out by the Beech-Nut Packing Company, did you?

A. No, sir.

X-Q. 143. And when you met Mr. Goldstein around in these places, was he taking orders for tobacco or introducing tobacco in the trade, as far as you know?

A. Why, yes.

X-Q. 144. He wasn't selling any food products?

A. No, sir.

X-Q. 145. As I understood you to say, you never knew any Lorillard man to represent the cigarettes or scrap tobacco were made by the Beech-Nut Packing Company, did you?

A. Not to me.

X-Q. 146. So far as you know they never did?

A. Not to me.

X-Q. 147. As far as you personally know you never heard that said?

A. I don't know what they said, somebody else.

X-Q. 148. I am just asking about yourself. You don't know?

A. No.

X-Q. 149. They never misrepresented it to you?

A. No, sir.

Mr. Cavanagh: I think that is all.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 150. You testified on cross-examination that you never told anybody that the Beech-Nut scrap tobacco was a product of the Beech-Nut Packing Company. Have you had occasion to tell anybody that it was not?

A. Yes, sir.

R-D. Q. 151. How many times do you suppose?

A. About seventy-five to one hundred times.

R-D. Q. 152. You refer to your experience in this territory?

A. Yes, when I give that number.

R-D. Q. 153. You were asked on cross-examination whether you had ever heard any Lorillard representative say that the scrap tobacco was a product of the Beech-Nut Packing Company, and several other questions of the same character, and you answered: "Not directly," or "Not to me." What did you mean by qualifying your answers in this way?

A. Why, I have heard of instances where they left the impression with the retailers that we were making the tobacco as well as the cigarettes. At least, that was the impression that the retailer conveyed to our salesman or to myself.

R-D. Q. 154. In order to illustrate what you mean, will you give me one of those instances?

A. On the scrap tobacco?

R-D. Q. 155. Yes.

A. Why, at the time this crew was working at Appleton, our retail man, Mr. Siesennop, went in to call on one of our grocery accounts in this city—it was either the same day or the following day after the tobacco salesman had been there—and the retailer was under the impression we were making tobacco.

R-D. Q. 156. Where is Mr. Siesennop now?

A. I think he is in Ashland, Wisconsin.

R-D. Q. 157. Where?

A. He is either in Ironwood, Michigan, or Ashland, Wisconsin, this week, way up in the northern part of the territory.

R-D. Q. 158. Now, you have testified on cross-examination that you, before you came to Wisconsin territory, were in the Pennsylvania territory?

A. What we call the western Pennsylvania territory. I was in Altoona and from Altoona I came to Pittsburgh, and from Pittsburgh there.

R-D. Q. 159. Did you hear any comment, remarks and inquiries about the Beech-Nut scrap down there?

A. Yes.

R-D. Q. 160. What was the character of the comments, inquiries and remarks that you heard?

A. The same character as we hear out here this time.

R-D. Q. 161. How many do you suppose you have heard down there?

A. Quite a few.

R-D. Q. 162. Do you mean ten or two?

A. Oh, I should say—of course, that is quite awhile ago, I can't remember exactly, I didn't pay much attention to that at the time—but I should say one hundred, at least. I didn't pay much attention to it at the time.

R-D. Q. 163. You said that Mr. Goldstein made this remark, that you have quoted, more than once; that Mr. C. W. Smith was present on one occasion. Who was present on some of the other occasions?

A. Why, on the next occasion Mr. Atkinson and I went in a cigar store over here, I don't just remember the name of it. I took it it was a cigar store—

R-D. Q. 164. What Atkinson is that?

A. Our Mr. L. R. Atkinson of the Beech-Nut Packing Company, and there were three or four other people in there.

R-D. Q. 165. Do you know the names of any of these other people?

A. Mr. Tuckwell was one. I don't know the others.

R-D. Q. 166. What is his initials?

A. I couldn't tell you.

R-D. Q. 167. Do you know him when you see him?

A. Yes.

R-D. Q. 168. What does he do?

A. He is running that cigar store.

R-D. Q. 169. What is the address of his cigar store?

A. East Water street, part of the Piggly Wiggly Store.

R-D. Q. 170. Are the Beech-Nut Packing Company products that you have personally handled, all packaged in the same kind of package?

A. No.

R-D. Q. 171. Well, how many different kinds of packages do you suppose there are? I don't want a tabulated list, I mean just approximately how many kinds of packages of goods?

A. Different sizes and styles and shapes, you mean?

R-D. Q. 172. Yes, could you give me an estimate of the number?

A. Over a dozen.

R-D. Q. 173. They pack goods in glass jars?

A. Yes.

R-D. Q. 174. They pack goods in cans?

A. Yes.

R-D. Q. 175. They put up goods in paper wrappers?

A. Yes.

R-D. Q. 176. They put up goods in paper and tinfoil wrappers?

A. Yes, sir.

R-D. Q. 177. They put up goods wrapped in cloth?

A. Yes, sir.

R-D. Q. 178. They pack goods in cardboard boxes?

A. Yes, sir.

Mr. Hinton: That is all.

*Re-Cross Examination by Mr. Cavanagh.*

R-X Q. 179. Does the Beech-Nut Packing Company put up cigarettes in cigarette packages?

A. Not to my knowledge.

R-X Q. 180. Do they put up scrap tobacco in scrap tobacco packages?

A. Not to my knowledge.

R-X Q. 181. You say you heard general comments hundreds of times about people inquiring if the Beech-Nut cigarette and Beech-Nut scrap tobacco like these exhibit packages here were put up by the Beech-Nut Packing Company. You never kept any track of the number of times?

A. No, might be more.

R-X Q. 182. That is simply an estimate on your part?

A. Yes.

R-X Q. 183. You don't know whether a single one of those persons ever took the trouble to read the writing on those packages, do you?

A. No, sir, I don't know.

R-X Q. 184. In your redirect examination, you have stated in substance that you have heard of instances where Lorillard salesmen left the impression with retailers that this scrap tobacco and these cigarettes were made by the Beech-Nut Packing Company. Now, let us get right down to cases on this and be blunt with each other. Do you yourself know of any instance where a Lorillard salesman did that?

A. Let us be frank.

R-X Q. 185. Absolutely.

A. I don't say what the Lorillard salesmen said, I don't know what the Lorillard salesmen said, all I know is what the retailers told us was their impression after the Lorillard salesman had left.

R-X Q. 186. Oh, then your whole answer was based



on hearsay and upon some retailer's mental impression, is that it?

A. My remarks were given as given to me by either my retail man or the dealer.

R-X Q. 187. You yourself could not name any Lorillard man that left such an impression, that you know of?

A. No, sir.

R-X Q. 188. And you yourself were never present when any Lorillard man left such an impression with a retailer?

A. No, sir.

R-X Q. 189. It was simply some sort of gossip that some retailer told you and without giving the man's name or anything else; is that it?

A. I don't know as it was gossip; it was just what he told me.

R-X Q. 190. Well, you yourself don't know of a single Lorillard man?

A. No, sir.

R-X Q. 191. Or a single instance where a Lorillard man deliberately told that those tobacco products were made by the Beech-Nut Packing Company, do you?

A. No, sir.

R-X Q. 192. And what they did tell you, was it some impression?

A. Yes, sir.

R-X Q. 193. And you don't know if those retailers ever took the trouble to read that package, do you?

A. No, sir.

R-X Q. 194. And you know Lorillard's name was on the packages of scrap tobacco and cigarettes?

A. Yes, sir.

R-X Q. 195. And you don't know if one of those retailers ever took the trouble to open up a carton of cigarettes, do you?

A. No, sir.

R-X Q. 196. Or to open up a carton of scrap tobacco?

A. No, sir.

R-X Q. 197. Or to look at the carton of scrap tobacco?

A. No, sir.

R-X Q. 198. What did you say this agent's name of yours was, Mr. Lewis?

A. Siesennop.

R-X Q. 199. You were not with him when he was talking to this retailer, were you?

A. No, sir.

R-X Q. 200. He works for the Beech-Nut Packing Company, this Mr. Siesennop?

A. Yes.

R-X Q. 201. And he brought that situation back to you?

A. Yes, sir, he told it to me the next day.

R-X Q. 202. And this Mr. Atkinson that you were speaking about, he is with the Beech-Nut Packing Company?

A. Yes, sir.

R-X Q. 203. What does he do?

A. He is working on this case under Mr. Hinton's instructions, I believe.

R-X Q. 204. He is a sort of inspector, is he?

A. Yes.

R-X Q. 205. He is from the home office at Canajoharie, N. Y., is he?

A. Yes, sir.

Deposition closed.

Signature waived.

CLARENCE W. SMITH, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name, age, residence and occupation?

A. Clarence W. Smith is my name; age, 27; occupation, canned foods broker.

Q. 2. Where is your place of business?

A. You mean the office where I work?

Q. 3. Yes.

A. 288 East Water street; 976 38th street, Milwaukee, is my new address. I just moved.

Q. 4. Are you acquainted with a Mr. Goldstein in Milwaukee?

A. I have met Mr. Goldstein.

Q. 5. And who is he?

A. I was introduced to him as a representative of the P. Lorillard Company.

Q. 6. And where was this?

A. In Kern & Sons cigar store, down here on East Water street.

Q. 7. Did you hear Mr. Goldstein make any statement about Beech-Nut cigarettes?

A. Why, I heard Mr. Goldstein make the statement in the presence of Mr. Lewis that "Beech-Nut cigarettes were quality goods, like the rest of the Beech-Nut line."

Q. 8. Was Mr. Lewis, who was present, the Mr. Lewis who is the division manager for the Beech-Nut Packing Company?

A. Yes, sir.

Q. 9. When Mr. Goldstein made this remark did he have Beech-Nut cigarettes with him?

A. He had a package and offered us a cigarette at the time.

Q. 10. Mr. Smith, when did I see you last?

A. About a week ago.

Q. 11. Since that time have you, of your own volition, made any inquiries from people about Beech-Nut cigarettes?

A. Why, on Sunday, this past Sunday, I was talking to my brother-in-law, who is quite a cigarette smoker and cashier of one of the leading banks here, and I asked him as to whether or not he ever knew that the Beech-Nut cigarettes, which he said he had smoked some, were packed by the P. Lorillard Company, and he said he did know it, but it was only recently he had found out they were put up by Lorillard, he was under the impression prior to that time they were put out by the Beech-Nut Packing Company.

Q. 12. I don't think it is permissible to say what people told you that they thought. I simply want any instances, if there have been any, where you asked somebody who made the cigarettes, and then I think you could state just what he said in direct answer to that question. Have there been any such instances as that?

A. Yes, there is just one instance that I know of. A friend of mine by name of William Enke, works over here in the Second Ward Bank; he was up to my house about two weeks ago when I asked him that question. He was smoking one—as a matter of fact it may have been a little longer than that, as a matter of fact, it was the same day the Beech-Nut cigarettes were put on the market here, I don't recollect what day that was, and I put the question to him and he said: "Yes, I bought them as being the Beech-Nut Packing Company cigarette." He said: "That was my opinion, I thought they were put out by the same people that put out Beech-Nut peanut butter."

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 13. Mr. Smith, as I understand it, you are in the food brokerage business?

A. Yes, sir; that is, the canned food brokerage business.

X-Q. 14. Do you handle in your business any of the products of the Beech-Nut Packing Company?

A. No, sir.

X-Q. 15. You don't have any dealings with them whatsoever?

A. No, sir, I am not in the grocery line; the brokerage game is an entirely different line of business.

X-Q. 16. So you don't come into contact, either directly or indirectly, with the Beech-Nut Packing Company, do you?

A. No, we do not.

X-Q. 17. And you have never done a stroke of business for those people?

A. No, sir.

X-Q. 18. Just tell me how you do your business in this food brokerage line.

A. Canned food line?

X-Q. 19. Yes, just briefly.

A. Our line of business is very similar to the stock brokerage business. We represent certain canners and do business for them, that is, sell their goods on a brokerage basis. That is about the sum and substance of the business, method of our doing business.

X-Q. 20. So your business brings you into contact with the food products line?

A. Oh, yes, yes, sir.

X-Q. 21. But it doesn't bring you into contact with the tobacco business, does it?

A. No, sir.

X-Q. 22. You don't handle any tobaccos at all?

A. No, sir.

X-Q. 23. You regard those as entirely distinct classes of goods, tobaccos and foods?

A. Yes.

X-Q. 24. They are different lines of business?

A. I wouldn't say that, not out in this territory they are not, because the average jobber in Milwaukee handles tobacco as well as food stuffs.

X-Q. 25. You don't handle tobacco?

A. Yes, but I am not a jobber, I am in the brokerage business.

X-Q. 26. I mean in your brokerage business?

A. No.

X-Q. 27. But you know that brokers handle tobacco stocks and tobacco goods, don't you?

A. I am not familiar with any of them, no, sir, not in this town here.

X-Q. 28. That is, as far as you are concerned, you don't know anything about the tobacco business at all; is that right?

A. That is right.

X-Q. 29. But if you wanted to buy, as an ordinary purchaser, if you wanted to purchase some chewing gum you would not take a package of cigarettes in place of the gum you asked for, would you?

A. No, sir.

X-Q. 30. And you would regard them as entirely distinct goods, wouldn't you? You couldn't be fooled for a minute, could you?

A. No, sir.

X-Q. 31. And you think a man who would take cigarettes or take scrap tobacco, when he wanted chewing gum or bacon, was crazy, wouldn't you?

A. Yes, I would have to draw that conclusion.

X-Q. 32. Now, when did you first meet this Mr. Goldstein?

A. Oh, I should say it was about three weeks ago; that is approximate, now, I am not just certain when I met him.

X-Q. 33. And that is the first time you ever met him, is it?

A. That is the first time I was ever introduced to him. I saw him before on the street.

X-Q. 34. And this place where you met him, what line of business is that?

A. In the tobacco business, cigar store.

X-Q. 35. Wholesale place?

A. Retail.

X-Q. 36. How did you happen to be in there?

A. I just purchased some cigars.

X-Q. 37. Did you meet Mr. Lewis in there, or was he in there when you went in?

A. Mr. Lewis was in there when I went in.

X-Q. 38. And you ran into Mr. Goldstein in this store; is that it?

A. Yes, sir.

X-Q. 39. And you got talking about the Beech-Nut products, Beech-Nut cigarettes?

A. Yes.

X-Q. 40. Did you know he was a Lorillard man when you went in with Mr. Lewis in that store and met him?

A. No, sir.

X-Q. 41. Did Mr. Lewis introduce you to him?

A. Mr. Lewis introduced me to him, yes, sir.

X-Q. 42. And Mr. Lewis told you that he was with the Lorillard Company, that is, that Mr. Goldstein was with the P. Lorillard Company?

A. Yes, sir.

X-Q. 43. So Mr. Lewis told you that right before Mr. Goldstein?

A. Yes, sir.

X-Q. 44. And then in the course of conversation this matter of cigarettes came up and he offered you a Beech-Nut cigarette, did he?

A. He didn't offer me a cigarette. As I recollect, he offered it to Mr. Lewis.

X-Q. 45. Knowing that Mr. Lewis was a Beech-Nut Packing Company man, he offered him a cigarette?

A. Yes, sir.

X-Q. 46. They were on friendly terms, evidently?

A. Oh, yes.

X-Q. 47. Mr. Lewis and Mr. Goldstein, I mean.

A. Yes.

X-Q. 48. And he didn't say these cigarettes were made by the Beech-Nut Packing Company, did he? Mr. Goldstein didn't say that?

A. No, sir.

X-Q. 49. He said nothing at all that would indicate that he thought they were made by the Beech-Nut Packing Company, did he?

A. Well, I would draw that conclusion from the statement he made to me; if he had made it to anybody else they would have drawn that conclusion.

X-Q. 50. That is, drawn the conclusion they were made by the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 51. Now, I would just like you to give me, as close as you can, his exact words that would lead a person to draw that conclusion. What were Mr. Goldstein's exact words?

A. He said they were quality products, like the rest of the Beech-Nut line.

X-Q. 52. He didn't say the Beech-Nut food products line, did he?

A. No, sir.

X-Q. 53. He didn't say the Beech-Nut chewing gum line?



A. No, sir.

X-Q. 54. He didn't say the Beech-Nut candy line?

A. No.

X-Q. 55. He might have meant the Beech-Nut scrap tobacco line, for all you know, might he not, being a tobacco man?

A. Possibly.

X-Q. 56. Well, did this man Goldstein look like an intelligent man, a man of ordinary commonsense?

A. Well, he had the average intelligence, I would say, yes.

X-Q. 57. Now, you were speaking about drawing a conclusion. In the ordinary course of human conduct, with the Beech-Nut candy company man standing right at your side, and being the man that introduced you to Mr. Goldstein, the Lorillard man, don't you think it entirely improbable that Mr. Goldstein would attempt in any way to misrepresent this cigarette as the product of the Beech-Nut Packing Company with the Beech-Nut Packing Company's division manager standing right there before him and ready to deny it? He couldn't have done that seriously, do you think?

A. Well, that is more than I can say.

X-Q. 58. Well, now, you yourself, just take for example, Mr. Smith, that you are representing, say, the McCormick Harvester people, and you bring in a friend of yours to the establishment of a customer of the McCormick Harvester people who was not selling the harvester, you would not expect that other man to mislead that other man right in front of the McCormick man, would you?

A. No, I wouldn't expect him to.

X-Q. 59. So there was no misrepresentation on Mr. Goldstein's part, so far as you could understand?

A. Well, it was kind of misleading, in a way.

X-Q. 60. He just used the word "Beech-Nut line," didn't he?

A. "Like the rest of the Beech-Nut line," yes, sir.

X-Q. 61. Now, presuming the Beech-Nut line of food products of the Beech-Nut Packing Company to be a high class of goods, might not it have been probable that he meant his cigarettes were as good in the tobacco line as the other Beech-Nut food products were in the food line?

A. Yes, he may have wished to interpret that.

X-Q. 62. Or, as I said before, he might have interpreted in connection with the Beech-Nut scrap tobacco, because that is a Beech-Nut line. He might have done that, mightn't he?

A. He made a rather broad statement to interpret it just that way.

X-Q. 63. But I am going on the presumption, as I understood you to testify, that the division manager of the Beech-Nut Packing Company was standing there. That would be the last moment in the world an ordinary man would make a misrepresentation, wouldn't it?

A. It ought to be.

X-Q. 64. It would seem insane for him to do otherwise, wouldn't it, to you, when the Beech-Nut man was right before him, ready to deny it and catch him up?

(No reply.)

X-Q. 65. That would have seemed far fetched, wouldn't it?

A. I would think so, yes.

X-Q. 66. You didn't take the package of cigarettes in your hands, did you?

A. No, sir, I didn't.

X-Q. 67. But he offered Mr. Lewis a package?

A. Yes.

X-Q. 68. Will you read whose name is on that package (indicating)?

A. "P. Lorillard Company."

X-Q. 69. You don't find the word "Beech-Nut Packing Company" any place on that package, do you?

A. No.

X-Q. 70. It was a package like this that Mr. Goldstein showed Mr. Lewis, wasn't it (indicating)?

A. Yes, sir.

X-Q. 71. So you had before you and Mr. Lewis, of the Beech-Nut Packing Company, the package of cigarettes with "Lorillard" on it, and Mr. Lewis knowing that Mr. Goldstein is the Lorillard man, and you think Mr. Goldstein knowing Mr. Lewis is the Beech-Nut Packing Company man, with the stage set in that way, you don't think a sensible man would represent that to be the Beech-Nut Packing Company's package, do you?

A. He ought not to.

X-Q. 72. It would seem silly, wouldn't it, when it could be so easily disproven, with the facts right in front of you, wouldn't it? Doesn't that strike you that way?

A. Oh, yes.

X-Q. 73. All Mr. Lewis would have to do is to take that package and hand it to you and show Lorillard's name on it, and show it was not theirs, and say: "I have been handling Beech-Nut Packing Company's goods for so many years, and it is not ours," and the man would have had no explanation, Mr. Goldstein, would he?

A. No.

X-Q. 74. You don't smoke these Beech-Nut cigarettes yourself?

A. I smoke no cigarettes at all.

X-Q. 75. You don't chew scrap tobacco, do you?

A. No, sir.

X-Q. 76. You never saw a product of the Beech-Nut Packing Company put up like a package of cigarettes, did you (indicating)?

A. No, sir.

X-Q. 77. And you never saw a product of the Beech-Nut Packing Company like a package of scrap tobacco like this Exhibit 8, did you (indicating)?

A. No, sir.

X-Q. 78. So far as you know the Beech-Nut Packing Company never put out any tobacco products, did they?

A. No, sir.

X-Q. 79. You said—was it your brother-in-law?

A. Yes.

X-Q. 80. (Continuing.) Thought they were Beech-Nut Packing Company cigarettes when he bought them?

A. Yes, sir.

X-Q. 81. You don't know personally whether he ever took the trouble to read the printed matter on the package and see who they were made by, do you?

A. I do not.

X-Q. 82. And likewise, in any other instance that you might have mentioned here, I think you did mention one more, you don't know if that party ever took the trouble to look at the package to see whose name was on it, do you?

A. No, sir.

Mr. Cavanagh: I think that will be all.

*Re-Direct Examination by Mr. Hinton.*

R-D. Q. 83. You have testified that Mr. Goldstein, exhibiting a package of cigarettes, said: "These cigarettes are quality goods like the rest of the Beech-Nut line." Now, of course, any statement is susceptible of a number of interpretations, some of which have been suggested by Mr. Cavanagh, as, for instance, that Mr. Goldstein meant that the Beech-Nut cigarettes were as good in the tobacco line as the Beech-Nut Packing Company's goods were in some other line. I want to test

the question in this way: If a P. Lorillard representative displayed Beech-Nut cigarettes and made exactly the statement that Mr. Goldstein made to an average person who knew nothing about the situation, what would you say the average person would have understood from that statement?

Mr. Cavanagh: Just one minute. That question is objected to as calling for an opinion, as based upon circumstances which are not proven here. The record conclusively shows that this witness was talking to a Lorillard man in front of a Beech-Nut man, and any question should be based upon that condition of affairs.

Mr. Hinton: I think it is a perfectly fair test of the statement, and it is not to be supposed that Mr. Goldstein would be any more careful with his statements in talking to average persons than he would when talking to a Beech-Nut Packing Company representative.

Mr. Cavanagh: Notice is hereby given that a motion will be made in proper time to strike out all testimony bearing upon the situation of affairs suggested in the last question propounded by counsel for Beech-Nut Packing Company and it is stipulated that this notice will stand for any similar questions relating to the same conditions.

(Last question read to the witness.)

Mr. Hinton: R-D. Q. 84. Do you understand the question?

A. Yes, sir. Why, I would say that the average person would conclude that Beech-Nut cigarettes were made by the same people who put out most of the other Beech-Nut products, such as peanut butter.

R-D. Q. 85. I understand from Mr. Cavanagh that you were asked specifically whether you would accept

a package of Beech-Nut chewing gum in place of a package of Beech-Nut cigarettes. Of course you answered "No." I want to ask you whether, if you were offered a package of Beech-Nut cigarettes bearing what appeared to you to be the same label as was on the chewing gum, you would accept those cigarettes as a product of the same people who made the chewing gum?

A. I don't quite get that question.

(Question read.)

Mr. Hinton: Assuming, of course, that you did not know the facts.

Mr. Cavanagh: The question is objected to as immaterial and irrelevant, as there is nothing in any exhibit or record in this case to show that there is any cigarette package bearing any chewing label similar to that used by the Beech-Nut Packing Company.

(Last question read as follows:

"Q. I understand that Mr. Cavanagh asked you specifically whether you would accept a package of Beech-Nut chewing gum in place of a package of Beech-Nut cigarettes. Of course, you answered: 'No.' I want to ask you whether, if you were offered a package of Beech-Nut cigarettes bearing what appeared to you to be the same label as was on the chewing gum, you would accept those cigarettes as a product of the same people who made the chewing gum, assuming, of course, that you did not know the facts?")

A. Yes, because I very seldom look for the producer's name.

Mr. Hinton: That is all.

*Re-Cross Examination by Mr. Cavanagh.*

R-X Q. 86. Now, Mr. Smith, one thing is certain: When you left this store, after your conversation with the Lorillard man in the presence of Mr. Lewis, you certainly were not under the impression those cigarettes were put out by the Beech-Nut Packing Company, were you?

A. No, sir.

R-X Q. 87. You knew they were P. Lorillard's cigarettes, didn't you?

A. Yes, sir.

R-X Q. 88. So, as far as what might or might not have been, it did not affect you, you knew they were Lorillard's cigarettes?

A. Yes, sir.

R-X Q. 89. I understood you to say, in regard to the chewing gum and the accepting of chewing gum and cigarettes as the product of the same company, that you never took the trouble to read what was on the label or printed matter?

A. No, sir.

Mr. Cavanagh: That is all.

*Re-Direct Examination by Mr. Hinton.*

R-D. Q. 90. Did you know before you went into the store where Mr. Goldstein made the remark, that the Beech-Nut cigarettes were not the product of the Beech-Nut Packing Company?

A. Did I know before?

R-D. Q. 91. Yes.

A. Yes, sir.

Deposition closed.

Signature waived.

THEODORE MUELLER, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name, age, residence and occupation?

A. Theodore Mueller; age, 44; residence, 443 64th Avenue; occupation, druggist.

Q. 2. Are you proprietor of a drug store?

A. I am.

Q. 3. Where is your drug store located?

A. I have two stores.

Q. 4. Where are they each located?

A. One at 6324 Greenfield Avenue, and one at 471 East Water Street.

Q. 5. Now, I show you a package of Beech-Nut cigarettes, in this case as Exhibit No. 1. Have you bought and sold those cigarettes in your store?

A. I have.

Q. 6. I wish you would tell me the circumstances under which you claim you ordered these cigarettes.

A. I was approached by a representative from a local tobacco firm and he asked me if we wanted any Beech-Nut cigarettes, and when I heard the name "Beech-Nut" cigarettes I took it for granted it was manufactured by the same firm that made other Beech-Nut products. Of course, we sell lots of Beech-Nut gum and Beech-Nut mints and other Beech-Nut products, so I gave him an order for 1000 to start out with and I asked him how they were selling, and he said they didn't have them in yet but that they expected them shortly and would send them over, and all this time I was under the impression that that was an article manufactured by the same firm



that makes the Beech-Nut gum. And when I received the package I discovered that it was not a Beech-Nut product, not an article manufactured by the same firm that makes Beech-Nut gum.

Q. 7. What do you mean by the "package"—the carton, or what? You said when you received the package, you mean the little package of cigarettes or the carton or the big container, or what?

A. Well, I don't remember that. To tell you the truth, if you asked me now I couldn't tell you what is on the package.

Q. 8. On the little package?

A. On the package, yes.

Q. 9. Could you tell me now whether the name of the manufacturer is written on the little package of cigarettes containing twenty cigarettes?

A. The manufacturer's name?

Q. 10. Yes.

A. I don't know.

Q. 11. Now, you have testified that when this man offered you Beech-Nut cigarettes you immediately ordered a thousand of them, and that you were under the impression that they were a product of the Beech-Nut Packing Company. What, if anything, did that belief on your part have to do with your ordering the cigarettes?

A. Well, we have sold Beech-Nut gum for some years, and it was always a good seller, and I thought anything with the Beech-Nut label on ought to be a good seller. We have had a very good sale on the gum and also on the confections.

Q. 12. How long have you personally sold cigarettes over the counter?

A. Oh, over twenty years.

Q. 13. Have you sold Camel cigarettes over the counter?

A. Yes, a good many.

Q. 14. How many packages did you suppose you have handed out?

A. It would be pretty hard telling; I would have to look over my bills.

Q. 15. What is written on a package of Camel cigarettes underneath the picture of a Camel, do you know?

A. No, I don't.

Q. 16. How many little packages of Lucky Strike cigarettes do you suppose you have handed out? Of course, you can't give the exact number, but approximation—would it be one hundred or five hundred?

A. It would be one hundred thousand or more than that, I would say. We buy them in case lots.

Q. 17. What is written on a package of Lucky Strike cigarettes underneath the red panel with the name "Lucky Strike"?

A. I don't know.

Q. 18. Do you have any difficulty in identifying a package of Camel cigarettes or Lucky Strike cigarettes when you want to get them to hand to a customer?

A. To identify that package?

Q. 19. No, I mean to pick them out from other brands.

A. No.

Mr. Hinton: Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 20. Mr. Mueller, did you ever hear of the P. Lorillard Company, tobacco manufacturers?

A. Yes, sir.

X-Q. 21. They are very large tobacco manufacturers, aren't they?

A. Yes, sir.

X-Q. 22. And you have handled the Murad, the Mogul and Egyptian Deity cigarettes made by that company?

A. Yes, sir.

X-Q. 23. Different brands?

A. I don't know whether made by that company or not.

X-Q. 24. But you have handled those cigarettes?

A. We sell them, yes.

X-Q. 25. So long as a cigarette brand is a good seller and is made by a reputable concern like Lorillard Company, you would not have any objection to handling that in your store, would you?

A. We are in the business to sell anything that sells.

X-Q. 26. That is what I mean, and if a product, for example a cigarette, is made by a well-known and established manufacturer, and it is a good seller, you have no objection to handling that, have you?

A. No, sir.

X-Q. 27. And as I understand it, when you first ordered these cigarettes and you received them you noticed they were not made by the Beech-Nut Packing Company, didn't you?

A. Yes.

X-Q. 28. As a man purchasing goods you looked and saw they were not a Beech-Nut brand?

A. Yes.

X-Q. 29. I show you this package of cigarettes, Exhibit No. 1, P. Lorillard Company's name is on there, isn't it, as a Lorillard product?

A. Yes.

X-Q. 30. I also show you a carton or box in which the cigarettes, the individual packages, are placed in bulk. Lorillard's name appears on that package, too, doesn't it?

A. Yes, sir.

X-Q. 31. And without going into any details, it was the general appearance and the name on the thing that

led you to know it was not a Beech-Nut Packing Company product, wasn't it?

A. No, the name "Beech-Nut" is so prominent on the package that would strike my eye before anything else.

X-Q. 32. But I am speaking about what did strike your eye that you knew it was not the Beech-Nut brand.

A. After I started to handle them, then I noticed it.

X-Q. 33. You noticed they were not the Beech-Nut people's product?

A. Yes.

X-Q. 34. So you did not labor under any misapprehension when you got those, as to whose cigarettes they were?

A. I was under a misapprehension when I ordered them.

X-Q. 35. The agent did not tell you they were made by the Beech-Nut Packing Company?

A. No, sir, I didn't ask him.

X-Q. 36. You didn't ask him and he didn't tell you?

A. No, sir.

X-Q. 37. You simply told him you would take Beech-Nut cigarettes?

A. Yes.

X-Q. 38. And that man that sold you the Beech-Nut cigarettes—did the man who sold them represent a reputable concern in town?

A. We have found them reputable.

X-Q. 39. What is the name of that concern?

A. Sher & Vinograd on Biddle street.

X-Q. 40. In your dealings you always found those people fair and reputable?

A. I haven't dealt with that firm very long, I have only been in this store since the first of July and we have had occasion to buy from them three or four times in that length of time.

X-Q. 41. But, I mean so far as your dealings with them have been, you have found them to be a reputable concern?

A. Yes.

X-Q. 42. When you opened the carton of cigarettes, did you notice a printed slip in there like this (indicating)?

A. I may have noticed it, but I never read it. I may have seen it. I never pay any attention to that.

X-Q. 43. You never pay any attention to it?

A. No.

X-Q. 44. But you did pay enough attention to see those cigarettes were not Beech-Nut Packing Company's when you got them?

A. I noticed that, yes.

X-Q. 45. Do you handle Beech-Nut scrap tobacco?

A. No.

X-Q. 46. A cigarette package has an individuality all its own, so far as its shape and general appearance goes, hasn't it, so you couldn't have any trouble in picking out a cigarette package from a package of chewing gum, would you?

A. I guess you can tell the difference.

X-Q. 47. If a man came into your store and asked you for a package of Beech-Nut cigarettes, would you hand him a package of Beech-Nut chewing gum in place of the cigarettes he asked for?

A. Not if I was awake.

X-Q. 48. You would think he was crazy if he took chewing gum for cigarettes, wouldn't you?

A. Yes, I should think so. I suppose he would think I was crazy if I gave them to him.

X-Q. 49. And you yourself wouldn't be deceived or confused into accepting chewing gum when you wanted cigarettes, would you?

A. No.

X-Q. 50. And that is because they are an entirely different class of goods; isn't that so?

A. Yes.

X-Q. 51. You never bought any tobacco products or cigarettes from the Beech-Nut Packing Company, did you, direct?

A. Don't smoke cigarettes.

Mr. Cavanagh: I think that is all.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 52. Mr. Mueller, your attention has been called on cross-examination to this carton, Lorillard's Cross-Exhibit—I think it is No. 6—being a carton containing ten little packages of Beech-Nut cigarettes, Plaintiff's Exhibit No. 1. Do you know whether all of the cartons like this you have received have the word "Lorillard's" written at the top?

A. I couldn't say.

R-D. Q. 53. And on the end (indicating)?

A. I couldn't say.

R-D. Q. 54. So far as these cartons go, you have never looked at all of the cartons that were put out, have you?

A. Never looked at any of them.

R-D. Q. 55. And this carton is like those you got, as near as your recollection goes?

A. I don't know, I would have to look at it again.

Mr. Hinton: That is all.

Deposition closed.

Signature waived.

J. E. BRIMAKOW, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Please state your name, age, residence and occupation.

A. J. E. Brimakow; thirty-eight years of age; residence, 980 35th street; occupation, manager of the cigar department of the Kiefer Drug Company.

Q. 2. Have you sold Beech-Nut cigarettes similar to Plaintiff's Exhibit 1, which I now show you, in that store?

A. I have.

Q. 3. How long have these cigarettes been on sale in this territory, as far as you know?

A. As far as I know, about two months.

Q. 4. When they were first offered to you, how many did you order?

A. I ordered one case.

Q. 5. How many would that be?

A. That is 10,000.

Q. 6. Is this the average order of a new brand of cigarettes, or wouldn't you consider that a large order?

A. That I would consider, for this place, a large order.

Q. 7. Why did you make such a large order?

A. Being the first one, and on account of the name "Beech-Nut." If it was another one I wouldn't order any at all until they were in town.

Q. 8. Since you have been selling these cigarettes have any comments, remarks or inquiries about the cigarettes been made to you by your customers?

A. Yes.

Q. 9. What is the nature of these remarks?

A. "Made by the Beech Nut Products Company?" and, "If it is as good as the gum, it must be a good cigarette."

Q. 10. Have you heard that kind of remarks more than once?

A. About half a dozen times.

Q. 11. How many cases of these cigarette's have you sold?

A. This is my fifth case.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 12. This store that you are the manager of the cigar department, is a large drug store, is it not?

A. Well, no, not considered as a large drug store, but as one of the prominent corner cigar stores doing a legitimate business under a full price, not a cut rate. It is one of the largest Rexall stores in the city.

X-Q. 13. And the title of it is the Kiefer Drug Company?

A. Kiefer Drug Company, yes, sir.

X-Q. 14. And that is located where?

A. At 238 West Water street, Milwaukee.

X-Q. 15. How long have you been in charge of the cigar department?

A. I have been in charge just exactly four months. I was with the Central Drug Company at first.

X-Q. 16. Do you know of the P. Lorillard Company?

A. I know them.

X-Q. 17. You have been selling, since you have been here, scrap tobacco known as the "Beech-Nut Scrap"?

A. Beech-Nut scrap, yes.

Mr. Hinton: That is objected to as outside of the line of direct examination.

Mr. Cavanagh: X-Q. 18. And you know that the cigarette package has on it the name "P. Lorillard Co."?

A. P. Lorillard, yes, sir.

X-Q. 19. And that cigarette comes in cartons like this one I show you (indicating)?

A. Yes.



X-Q. 20. Which is marked in this case as Defendant's Cross-Exhibit 9?

A. Yes.

X-Q. 21. And that has the name "P. Lorillard, Beech-Nut" on it?

A. Yes, sir.

X-Q. 22. And in the carton there appears a yellow slip, which I now mark for identification as Defendant's Cross-Exhibit No. 10, and which bears the words "Lorillard's Beech-Nut"?

A. Yes, sir.

X-Q. 23. And when you have a carton of these cigarettes open in your show window, you have this yellow sign in it, do you not?

A. Yes, sir.

X-Q. 24. And that is the way you put it in your window (indicating)?

A. That is the way I always put them in the window, yes.

X-Q. 25. You know the Lorillard Company is a very large tobacco concern?

A. Yes.

X-Q. 26. They handle a good large line of cigarettes?

A. High-grade cigarettes.

X-Q. 27. You have a good sale of their products?

A. We have a good sale of their products.

X-Q. 28. In other words, you have absolutely no objection to ever putting in a P. Lorillard Company tobacco product, have you, because their reputation is good?

A. Sure.

X-Q. 29. Did you look at these packages when you first received them?

A. I did.

X-Q. 30. You saw the name "Lorillard's" on them?

A. Yes, I did.

X-Q. 31. You knew they were Lorillard's cigarettes?

A. Yes.

X-Q. 32. You were perfectly willing to go on and sell Lorillard's goods?

A. Yes.

X-Q. 33. If you went into a store you wouldn't purchase chewing gum or candy, if you wanted cigarettes, would you? That is, I will put the question like this: If you went into a store and wanted to get a package of Lorillard's Beech-Nut cigarettes, you wouldn't be fooled by the salesman into taking a package of chewing gum in the place of cigarettes, would you?

A. No.

X-Q. 34. An entirely different class of goods?

A. Yes, sir.

X-Q. 35. You knew that the scrap tobacco was a Lorillard's tobacco?

A. Always did know it.

X-Q. 36. You would naturally presume this was the same thing, the Lorillard cigarette?

A. Yes, sir.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 37. Did you know that the cigarettes were not the Beech-Nut Packing Company product before you received them?

A. I knew it.

R-D. Q. 38. That is, before the carton and package came in?

A. Before the carton came. I was told by the P. Lorillard representative they were going to take big. And there is another statement: This is one will take big, that we were compelled to uphold the price on this cigarette, if not we would be discontinued handling it on account of that name "Beech-Nut."

Deposition closed.

Signature waived.

*State of Wisconsin, County of Milwaukee, ss.*

I, Henry F. Weller, a Notary Public within and for the State and County aforesaid, do hereby certify that the foregoing depositions of Mrs. Amelia Petersen, H. N. Petersen, O. M. Wesling, Miss C. Heller, Miss M. Springer, Carl W. Nemetz, E. J. McFadzen, William C. Weigel, Henry W. Foote, E. R. Lewis, Clarence William Smith, Theodore Mueller and J. E. Brimakow were taken before me, in behalf of Beech-Nut Packing Company, plaintiff, pursuant to notice and agreement at Room 312, Wisconsin Hotel, Milwaukee, Wisconsin, beginning at 11:00 o'clock A. M., November 4, 1921; that each of the aforesaid witnesses was by me duly sworn; that the testimony of said witnesses was taken by me in shorthand and thereafter reduced by me to typewriting; that the foregoing pages contain a true and accurate transcript of my stenographic notes; that the plaintiff was represented by Sebastian Hinton of Of-field, Poole, Hinton & Scott; that the defendant was represented by Richard B. Cavanagh of Meyers, Cavanagh, Whitehead & Hyde, during the taking of said testimony; that the testimony was concluded November 5, 1921 at about 3:00 o'clock P. M.; and signature of each witness was waived; that I am not connected by blood or marriage with either of said parties or interested directly or indirectly in the matter in controversy.

I further certify I have been paid the sum of for taking, transcribing and certifying the foregoing testimony, and that the same is a fair, just and reasonable charge.

HENRY F. WELLER,  
*Notary Public in and for  
Milwaukee County, Wisconsin.*

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF  
NEW JERSEY.

Beech-Nut Packing Company }  
vs. } In Equity No. 3056.  
P. Lorillard Company. }

Depositions taken pursuant to notice and by agreement of counsel by and before Leo M. Fox, a Notary Public and Court Reporter, acting as Special Examiner by consent of counsel, at the office of Leo M. Fox, 511 Produce Exchange Bldg., Toledo, Ohio, Wednesday, November 8, 1921, beginning ten A. M.

Present: Sebastian Hinton, Esq., of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company, plaintiff. Richard B. Cavanagh, Esq., of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company, defendant.

OSCAR JOSEPH, a witness produced on behalf of plaintiff, pursuant to notice, by agreement of counsel, first being duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. Oscar Joseph; 32; 1129 Summit St., Toledo, Ohio.

Q. 2. Your occupation?

A. I am in the grocery business, grocery and meat market.

Q. 3. Where is your store located?

A. At the present time, 502 Cherry.

Q. 4. Do you sell tobacco products in this store?

A. Yes.

Q. 5. I show you a package of Beech-Nut scrap tobacco, in this case, Plaintiff's Exhibit No. 3; have you sold this product in your store?

A. A number of years.

Q. 6. How long have you sold it?

A. Between six and seven years.

Q. 7. How much have you sold, approximately—is it a good deal or little?

A. Oh, quite a bit. I cannot remember how much, but we sell an awful bunch of it.

Q. 8. During this six or seven years, that you have been selling this product, whose product did you think it was?

A. Of course the Beech-Nut people.

Q. 9. Do you know who makes that product?

A. I did not really know that always—I thought the Beech-Nut people.

Q. 10. I was in here about fifteen minutes ago and we have just come back to take this deposition. Did you in the meantime, ask a customer anything about this?

A. Yes.

Q. 11. And what did you ask him?

A. I asked him, "Who do you think makes the Beech-Nut tobacco?" He said, "Of course, the Beech-Nut people."

Q. 12. Have you previously heard this matter discussed by the customer?

A. Quite a few.

Q. 13. What have they said?

A. They all say—they talk about who is making the tobacco, they don't stop to think to read the name, they think it is the Beech-Nut people.

Q. 14. Have you heard this discussed a little or a good deal?

A. Quite often.

Q. 15. During the past six or seven years?

A. During the time I was doing business.

Q. 16. Do you know the name of this customer whom you just asked about this?

A. No, I can get you his name easy, he used to work for B. A. Berry; he is working for Wilson Company now.

Q. 17. What is their line?

A. Meat business.

Q. 18. You know him personally?

A. Yes.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 19. Do you do the buying for this concern?

A. Yes.

X-Q. 20. From whom do you buy this Beech-Nut tobacco?

A. We buy it down town now.

X-Q. 21. From the jobber?

A. Yes.

X-Q. 22. You do not buy it from the Beech-Nut Packing Company?

A. No.

X-Q. 23. Never did?

A. No.

X-Q. 24. You never heard of the Beech-Nut Tobacco Company selling food products?

A. No, don't know anything about it.

X-Q. 25. You never heard of it?

A. No.

X-Q. 26. You have bought stuff from the Beech-Nut Packing Company salesmen?

A. No, we buy everything down town.

X-Q. 27. You never took the trouble to read the writing on a package of Beech-Nut scrap?

A. No.

X-Q. 28. You have heard of the P. Lorillard Tobacco Company?

A. Yes, I have heard of them, sure.

X-Q. 29. Do you see Lorillard's name on there (Exhibiting Exhibit 3 to witness)?

A. Yes, of course, if you stop to read.

X-Q. 30. You never bought any of the Beech-Nut Packing Company's goods, that is, their food products, or chewing gum, that was put up like a package of scrap tobacco?

A. Not like the package—same name, everybody thinks it is the same firm.

X-Q. 31. You never saw that name, Lorillard's?

A. No.

X-Q. 32. You never bought any food products or chewing gum that looked like a package of cigarettes?

A. No, not that looks alike; they are different packages.

X-Q. 33. If a man came in your store here, and he wanted to buy some Beech-Nut bacon, or he wanted to buy some Beech-Nut chewing gum, you would not hand him this package of Beech-Nut scrap tobacco for the chewing gum?

A. No. He will tell what he wants, Beech-Nut tobacco, or gum, or bacon.

X-Q. 34. You would think he was crazy if he would take the tobacco instead of the bacon?

A. Yes, he will think I am crazy if I give him tobacco instead of bacon.

X-Q. 35. That is because they are entirely different goods?

A. Yes.

X-Q. 36. This Beech-Nut tobacco is a very good seller?

A. Yes.

X-Q. 37. You know a tobacco concern like Lorillard's, that handles Murads, Moguls and Egyptian Deities, that is a good concern?

A. Yes.

X-Q. 38. You have no objection to handling their goods?

A. No.

X-Q. 39. So far as your business goes, as long as this tobacco is a good seller, it would not make any difference whether it is made by Lorillard or the Beech-Nut Packing Company?

A. No, it would not make any difference to me.

X-Q. 40. As long as it is a good seller?

A. Yes.

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 41. Did you know Lorillard Company made the Murad cigarettes before Mr. Cavanagh mentioned it?

A. No, I did not really know.

R-D. Q. 42. Who makes the Egyptian Deity cigarettes, do you know?

A. I don't know.

R-D. Q. 43. Do you know who makes the Camel cigarettes or Fatima?

A. No, by God, I don't remember it; I used to remember all the names of the firms.

R-D. Q. 44. Did you ever notice this name, Lorillard, on the package?

A. If you start to read it.

R-D. Q. 45. Let me ask this question: Did you ever notice the name "Lorillard" on this package before Mr. Cavanagh showed it to you?

A. No.

Redirect examination closed.



*Recross-Examination by Mr. Cavanagh.*

R-X Q. 46. Then you never took the trouble to investigate or find out who made Beech-Nut scrap tobacco?

A. No, I never paid any attention to it.

R-X Q. 47. It did not make a bit of difference to you who made it, did it?

A. No, of course not.

R-X Q. 48. But you have heard of the Murad cigarettes?

A. I have sold them, I have sold the Murad cigarettes.

Recross-examination closed.

Deposition closed.

Signature waived.

MIKE SABA, a witness produced in behalf of plaintiff, pursuant to notice by agreement of counsel, first being duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. What is your name, age, residence and occupation?

A. Mike Saba; 1129 Summit street.

Q. 2. You are a partner with Mr. Oscar Joseph in the grocery and meat market?

A. Yes.

Q. 3. Located at 502 Cherry street, Toledo, Ohio; is that correct?

A. Yes.

Q. 4. Do you handle tobacco products in this store, Mr. Saba?

A. Yes.

Q. 5. I show you a package of Beech-Nut scrap tobacco, in this case Plaintiff's Exhibit No. 3; have you sold this tobacco over the counter?

A. Yes, lots of it.

Q. 6. How long have you sold it over the counter?

A. Six or seven years. I used to be on the corner over there, and I moved here.

Q. 7. Now, during those six or seven years you sold this tobacco over the counter, whose product did you think it was?

A. I thought it was the same people—Beech-Nut chewing gum, all the same company.

Q. 8. Did you ever hear any of your customers talk about this tobacco, and who made it?

A. I heard sometime one fellow, he thought chewing gum and Beech-Nut tobacco all one kind, the same people make it, that is all I heard, all I know.

Q. 9. I understand the others did not discuss the question with you, the other customers?

A. Yes.

Q. 10. Have you ever told your customers about who makes this tobacco?

A. No, I did not tell them—I thought the same company made them. You asked me if I thought the Beech-Nut chewing gum and tobacco were made by the same people. I said I do not know, I think it is one people. You told me yesterday. I said I did not know that before.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 11. You never took the trouble to find out who made the tobacco, did you?

A. No.

X-Q. 12. You never read the package?

A. No, I do not read very much, and I did not look.

X-Q. 13. You did not pay any attention to it at all?

A. No.

X-Q. 14. It is a good selling tobacco, isn't it?

A. Yes, it is a good selling tobacco.

X-Q. 15. As long as it is a good selling tobacco, it don't make any difference to you who made it?

A. Yes, that is right; if it is a good seller.

X-Q. 16. A good seller, that is all you are interested in?

A. Yes.

X-Q. 17. You have been finding this to be a good selling tobacco for six or seven years?

A. Yes.

X-Q. 18. And there is quite a demand for it?

A. Yes.

X-Q. 19. If a customer came in this store and he wanted some chewing gum, or wanted some Beech-Nut bacon, you would not give him a package of Beech-Nut scrap tobacco for the bacon?

A. No; if he wanted Beech-Nut bacon or gum, I would ask him what he wanted.

X-Q. 20. You would not confuse him by giving tobacco for bacon?

A. Yes, when he wants bacon, he says bacon, and if he wants chewing gum, he says chewing gum; or if he wants tobacco, he says tobacco.

X-Q. 21. That is, because they are entirely different goods, tobacco is not like chewing gum?

A. No.

X-Q. 22. Chewing gum is not put up like this tobacco package?

A. No.

X-Q. 23. It don't look like that?

A. No.

X-Q. 24. You don't know whether these customers ever took the trouble to find out who made the tobacco, do you?

A. There is some fellow might.

X-Q. 25. But you never took the trouble to find out who made it?

A. No.

Cross-examination closed.

Deposition closed.

Signature waived.

JOHN JOZSA, a witness produced in behalf of plaintiff, pursuant to notice, by agreement of counsel, first being duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. My name is John Jozsa; age, 36; residence, 2344 Calidonia.

Q. 2. Your occupation?

A. Meat cutter and grocery clerk.

Q. 3. Where are you employed, Mr. Jozsa; what store are you employed at?

A. I worked in Jacobs' grocery on Front street, and in Rachies', on Adams—it is not in business any more; I worked at 324 South street. That place is closed now, but I worked there.

Q. 4. Where are you now employed?

A. Saba & Joseph.

Q. 5. That is at 502 Cherry street?

A. Yes.

Q. 6. I show you a package of Beech-Nut scrap tobacco, which is in this case as Plaintiff's Exhibit No. 3. Have you in the course of your working in these various stores, including this one, sold this tobacco over the counter?

A. Yes, sir, a lot of times.

Q. 7. How long have you sold it over the counter?

A. The first time I worked in the grocery store was in 1911 and 1912. That is the first time I worked in the grocery in connection with meat.

Q. 8. In that store?

A. Yes.

Q. 9. How long have you been working in this store here?

A. Since July.

Q. 10. 1921?

A. Yes.

Q. 11. How long did you work in that first grocery store?

A. Just even two years.

Q. 12. Then, what was the next one you worked in?

A. At Ratchie's, on Adams street.

Q. 13. How long did you work there?

A. I worked there about eight months.

Q. 14. Then the next one that you worked in?

A. Next one, I started in August and quit in March, about six or seven months.

Q. 15. Then you came here?

A. I came here in July.

Q. 15a. Now, during this time that you have been selling this scrap tobacco over the counter, whose product did you think it was?

A. I thought it was the Beech-Nut people; I never looked at the name, but Beech-Nut, I heard of those products before.

Q. 16. You have heard of Beech-Nut products before?

A. Yes.

Q. 17. Can you name some of these other Beech-Nut products?

A. Oh, they have bacon, and dried beef, and hams, and chewing gum.

Q. 18. Do you know now who makes this product?

A. I do not know of any one else than the Beech-Nut people.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 19. What is the name of the concern that makes the Beech-Nut ham and bacon, what is their names, do you know?

A. No, I cannot remember that, because I did not handle any of their products for quite a while.

X-Q. 20. So you do not know really who makes the Beech-Nut bacon?

A. No.

X-Q. 21. You never took the trouble to read the printing on the package to see who made the Beech-Nut scrap, did you?

A. No. Generally when somebody wants tobacco in a hurry, I just grab it and give it to them.

X-Q. 22. You never even took the trouble to look at it to see who made it?

A. No.

X-Q. 23. You see the name Lorillard on there, don't you?

A. Yes.

X-Q. 24. If a customer came into your store and he wanted to buy some bacon, or wanted to buy some Beech-Nut chewing gum, and he asked you for bacon or gum, you would not hand him out tobacco for bacon or gum?

A. No.

X-Q. 25. Entirely different kind of goods, aren't they?

A. Oh, yes.

X-Q. 26. You would not confuse bacon or chewing gum with tobacco, would you?

A. No, because they would say bacon or tobacco or gum.

X-Q. 27. Entirely different goods?

A. Yes, oh yes.

X-Q. 28. Bacon and chewing gum are not put up to look like this tobacco package, are they?

A. No.

X-Q. 29. You could tell the difference about them in a glance, couldn't you?

A. Yes.

Cross-examination closed.

Deposition closed.

Signature waived.

LLOYD SCHULTZ, a witness produced in behalf of plaintiff, pursuant to notice by agreement of counsel, first being duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Lloyd Schultz, 914 South street, Toledo, Ohio; grocery clerk.

Q. 2. Where are you employed?

A. Saba & Joseph, corner Huron and Cherry streets, Toledo, Ohio.

Q. 3. That is 502 Cherry street?

A. Yes.

Q. 4. How long have you been employed there?

A. Going on eight years.

Q. 5. Do you sell tobacco products in that store?

A. Yes.

Q. 6. I show you a package of Beech-Nut scrap tobacco, which is in this case as Plaintiff's Exhibit No. 3; have you sold this tobacco in this store?

A. Yes.

Q. 7. For how long?

A. Ever since I was here, that they handled it.

Q. 8. How many years would that be approximately, or roughly?

A. Six or seven years.

Q. 9. Have you yourself personally handed it to customers over the counter?

A. Yes.

Q. 10. Have you handed it a good deal or little?

A. Quite a bit.

Q. 11. Now, whose product did you think it was all this time?

A. I thought it was all the same thing, Beech-Nut, I never knew the difference. I never looked at it and never knew the difference but what it was Beech-Nut, all comes from the same place.

Q. 12. Can you name any other Beech-Nut things?

A. Yes. Beech-Nut bacon, Beech-Nut peanut butter, Beech-Nut beans, and quite a few things.

Q. 13. And chewing gum?

A. Yes, I always said tobacco, but I know better, it ain't now.

Q. 14. Do you know now who made this product?

A. I know you don't make it. Before I thought it was the same people that made the gum and tobacco.

Q. 15. Who told you?

A. The gentleman out there; the salesman, Mr. Atkinson.

Q. 16. When did he tell you he did not make this product?

A. Yesterday.

Q. 17. Had he told anybody else in the store at the same time he told you?

A. Yes, the two bosses.

Q. 18. Mr. Saba and Mr. Joseph?

A. Yes.



Q. 19. Were you in the store in approximately the fifteen-minute interval between the time I first came in this morning up to the time I come back, and did you hear Mr. Joseph ask a customer about this scrap tobacco?

A. Yes.

Q. 20. Who was this customer?

A. A meat salesman.

Q. 21. Do you know him?

A. Yes.

Q. 22. What is his name?

A. We call him Otke, Otkenheimer is his name.

Q. 23. By whom is he employed?

A. By Wilson & Co.

Q. 24. What did Mr. Joseph ask him?

Mr. Cavanagh: That is objected to; it is calling for hearsay.

Mr. Hinton: This is offered in corroboration of Mr. Joseph's statement.

Q. 25. Now, what did Mr. Joseph ask him, and what did he say?

A. He was talking about tobacco and he thought the tobacco and gum all come from one company.

Q. 26. Who said this?

A. This meat salesman.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 27. What is the name of the concern that makes peanut butter?

A. The Beech-Nut?

X-Q. 28. Yes; what is the name of the concern?

A. I never paid attention particularly to the name itself.

X-Q. 29. So you don't know what concern made it?

A. No.

X-Q. 30. Same as to the bacon and gum?

A. Yes.

X-Q. 31. Did you ever hear of P. Lorillard Company, tobacco people?

A. I may have heard of them, but not paid any attention to it.

X-Q. 32. Do you use tobacco?

A. Yes, I do.

X-Q. 33. Smoke?

A. Yes.

X-Q. 34. Did you ever smoke Murad cigarettes?

A. No, I always smoke Camels.

X-Q. 35. Do you chew tobacco?

A. Very seldom.

X-Q. 36. Did you ever chew any of this Beech-Nut tobacco?

A. I never did.

X-Q. 37. But you have been selling it for five or six years?

A. Yes.

X-Q. 38. It is a good seller?

A. Yes, good seller, best seller we got.

X-Q. 39. You never do any of the buying for this store, do you?

A. No.

X-Q. 40. You never have bought chewing gum or tobacco for the store?

A. No.

X-Q. 41. You never took the trouble to read the wording on this package?

A. No, never paid any attention to it.

X-Q. 42. So you wouldn't know whether it was Smith, Jones or Brown's tobacco?

A. I know it was the Beech-Nut people; that is all I know about it.

X-Q. 43. You went by that name "Beech-Nut"?

A. Yes.

X-Q. 44. That is all?

A. Yes.

X-Q. 45. You did not pay any attention to who manufactured it or where it came from, or anything?

A. No.

X-Q. 46. When the customers come in like this customer you spoke of this morning, you never got a package of tobacco to compare it with a package of chewing gum, to see who made it, did you?

A. No.

X-Q. 47. Just simply had some idle conversation and paid no further attention to it; is that right?

A. Yes.

X-Q. 48. If you wanted to find out whether a newspaper was of a certain date, or a product was made by a certain concern, and you were enough interested, you would read the printing matter and see?

A. Yes.

X-Q. 49. But you were not interested in this case, and paid no attention?

A. I did not pay any attention.

X-Q. 50. If you went into a store and wanted some Beech-Nut peanut butter or chewing gum, could you be fooled by the dealer in taking a package of tobacco instead of gum?

A. No, I am too much experienced for that.

X-Q. 51. In other words, you would think a man was crazy for taking tobacco for gum?

A. He ought to know better. If a man would ask for Beech-Nut peanut butter, he would not expect a man to give him Beech-Nut tobacco. If he would ask for tobacco, he would not expect him to give him peanut butter.

X-Q. 52. You never saw a package of chewing gum or a glass of peanut butter put up to look like the tobacco package like this?

A. No.

X-Q. 53. You could tell a tobacco package when you see it?

A. Yes.

X-Q. 54. You can tell a cigarette package?

A. Certainly can.

X-Q. 55. You never saw any chewing gum, or peanut butter, or ham put up like cigarette packages, did you?

A. No.

Cross-examination closed.

#### STIPULATION.

It is stipulated by and between the parties hereto, through their respective counsel, that if the witnesses whose names are appended hereto were called they would testify as follows, except with respect to the particular length of time within which these witnesses had sold the Beech-Nut scrap tobacco over the counter; that the length of time during which each of said witnesses have sold the scrap tobacco over the counter is given in the appended list of witnesses and is to be understood as to being incorporated in the testimony of each witness.

#### *Direct Examination.*

I am a retail grocery, handling tobacco products. I have stocked and sold Beech-Nut scrap tobacco identical with Plaintiff's Exhibit No. 3 in this case for a period of ....., stated opposite my name in the appended list. I always believed that this tobacco was a product of the Beech-Nut Packing Company until I was advised in November, 1921, by a representative of the

Beech-Nut Packing Company that this tobacco was not a product of that company. I have purchased the tobacco through a jobber located in Toledo, Ohio.

On cross-examination the witness would testify as follows:

I never took the trouble to read the printed matter on the package and did not notice the name "Lorillard," or the name of the manufacturer, and paid no attention to the matter at all, as this Beech-Nut scrap tobacco is a good selling tobacco, which I have had on sale for a number of years past, and have bought at different times, and I would sell it irrespective of what company made it. Furthermore, I have never purchased or sold or known of a product of the Beech-Nut Packing Company to resemble a package of scrap tobacco, or a package of cigarettes, and furthermore, I would not sell a customer this scrap tobacco when he asks for Beech-Nut chewing gum or Beech-Nut bacon, or Beech-Nut food products of any sort, nor would I be confused or deceived myself into accepting this Beech-Nut scrap tobacco for Beech-Nut gum or Beech-Nut food products, as I regard the same as entirely distinct and different class of goods.

#### LIST OF WITNESSES.

Frank O'Connell, 616 Jefferson St., Toledo, O. (sold tobacco over counter two years);

Henry Dieckman, 713 Monroe St., Toledo, O. (sold tobacco over counter two years);

W. Shaffer, 434 Dorr St. (sold tobacco over counter for one year);

H. A. Neff, 1129 Monroe St. (sold tobacco over counter for about a year).

It is further stipulated, if Isabel Shaffer were called, she would testify on direct and cross-examination, in accordance with the foregoing stipulation except that she is employed in the Shaffer Drug Store, 629 Cherry St., Toledo, Ohio, instead of a grocery store, as in the case of other witnesses, and that she has been selling the Beech-Nut tobacco for several years.

## CERTIFICATE.

*State of Ohio, County of Lucas, ss:*

I, Leo M. Fox, hereby certify that I am a notary public within and for the County of Lucas, State of Ohio, and court reporter; that the foregoing depositions of Oscar Joseph, Mike Saba, John Jozsa and Lloyd Schultz were taken by me acting as Special Examiner by agreement of counsel, pursuant to notice, and by agreement of counsel; that these depositions were taken stenographically by me and by me reduced to written form, at this office beginning November 7, 1921, at 10 A. M., and ending the same day; that each witness was duly sworn before he testified, except with respect to these witnesses whose testimony was stipulated as appears in the record; that the signature of each witness was waived by agreement of counsel; that I am not related by blood or marriage to any of the parties to this case or interested directly or indirectly therein. I further certify that I have been paid \$ ....., my fees for taking and transcribing the foregoing testimony, and that the same is a fair, just and reasonable charge.

LEO M. FOX,  
Notary Public, Lucas County, Ohio.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW  
JERSEY.

Beech-Nut Packing Company }  
vs. } Equity No. 3056.  
P. Lorillard Company. }

Deposition taken in behalf of plaintiff, before Sarah E. Harvey, Notary Public, acting as Special Examiner by consent of counsel, pursuant to notice and by agreement of counsel, at Room 1737 First National Bank Building, Chicago, Illinois, beginning Friday, January 13, 1922, at 2:30 P. M.

Present: Sebastian Hinton, H. McClure Johnson, of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

FRANK M. FAIRFIELD, a witness produced in behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Johnson, deposes as follows:

Q. 1. Your name is Frank M. Fairfield; your address is 10422 Longwood drive, Chicago; your age is 55 years; occupation, lawyer; is that correct?

A. That's correct.

Q. 2. Where is your office, Mr. Fairfield?

A. 39 South LaSalle street, Chicago. My law office.

Q. 3. Have you any other office?

A. At International Anti-Cigarette League, 58 West Washington street, Chicago.

Q. 4. Are you actively interested in the work of the International Anti-Cigarette League?

A. I am chairman of the Board of Directors.

Q. 5. Do you play an active part in any other public movements that bring you into touch with large numbers of people?

A. For five years I have been District Commissioner of the Boy Scouts of America. I am chairman of the Board of Examiners of the American Red Cross Life Saving Corps. I am chairman of the Boy Scout Committee of the Hamilton Club of Chicago. I am one of the officers of the American Swimming Association of Boston. I am one of the organizers and have always been secretary of the Sane Fourth Association. I have practiced law in Chicago for twenty-five years—no, more than that.

Q. 6. How long have you taken part in the Anti-Cigarette movement?

A. I have been interested in that for some six or seven years. I have been actively engaged in it for the past five years. I was one of the organizers of the legal work of incorporating the International Anti-Cigarette League.

Q. 7. When was that league organized?

A. Incorporated in March, 1920—that is, the present organization. The old league was incorporated in 1899.

Q. 8. Will you please name the officers of the International Anti-Cigarette League?

A. Dr. D. H. Kress—President, Takoma Park, Washington, D. C.

Treasurer—William T. Smith, Department Manager Marshall Field & Company.

Secretary—Mrs. Alice H. Mather, former lecturer of the Illinois Federation Parent-Teacher Associations.

Vice-presidents—

Hudson Maxim, high-explosive inventor, New York City.

Rev. John Timothy Stone, Fourth Presbyterian Church in Chicago.



Wu Ting Fang, Shanghai, China.

Dr. Winfield Scott Hall, head department Social Hygiene, Board of Temperance and Moral Welfare, Presbyterian Church, Berwyn, Illinois.

Mrs. Lorraine Elizabeth Wooster, State Superintendent of Schools, Topeka, Kansas.

Rev. S. B. Edmonson, First M. E. Church, Lake Forest, Illinois.

C. W. Barrett, M. D., gynecologist and head of department Cook County Hospital, also professor of gynecology, University of Illinois and Chicago Polyclinic School.

Frederick M. Sisson, of Howland School, Chicago.

Q. 8a. Will you please name the directors of the League?

A. The directors are myself, chairman of the board.

Judge Victor P. Arnold, Judge of the Juvenile Court, Chicago.

Mrs. Frank L. Bellows, president of the League of Cook County Women's Clubs.

R. D. Klees, managing director Union League Foundation for Boys' Clubs, Chicago.

Mrs. Alice H. Mather, lecturer Illinois Federation Parent-Teacher Association.

Charles S. Roberts, First National Bank of Chicago.

Frederick L. Rossback, ex-president Hamilton Club, Chicago, and president of the Washington Shirt Company of Chicago, Minneapolis and other large cities where they have stores.

A. N. Marquis, is the founder and editor of "Who's Who in America."

William T. Smither, department manager of Marshall Field & Company, Chicago.

Q. 9. What is the purpose of the International Anti-Cigarette League?

A. The object is to safeguard the health and morals

of the youths from the use of cigarettes and tobacco, and provide those who are addicted to the tobacco habit with a prescription for a cure, upon request.

Q. 10. What is the slogan of the League?

A. The slogan is "Give the Boy a Square Deal."

Q. 11. What is its geographical field?

A. No limit.

Q. 12. How much of the world do you cover at present?

A. United States, Canada, and eighteen foreign countries.

Q. 13. How does the league organize its work through that field?

A. Through local units, in cities, towns, villages, wherever there is an influential body of citizens who indicate that they are interested in our work.

Q. 14. Do you find interest is taken in many communities?

A. A great many communities.

Q. 15. What class of people are found to take an interest in this?

A. Prominent, influential people, who are interested in the welfare of the boy especially. Men's clubs, women's clubs, and business men.

Q. 16. About how many local units have you in the United States?

A. I presume six hundred.

Q. 17. What is the nature of the work that the League carries on through these local units?

A. Educational, curative, law enforcing.

Q. 18. In regard to what do you give out information?

A. In regard to the detrimental effects of the cigarette on the human system, and especially upon the boy. Injurious effects of the cigarette upon them. We also give prescription for a cure wherever it is requested—cure for cigarette or tobacco habit.

Q. 19. To whom do you aim to give this information?

A. Everybody. Boys, adults, legislators, anybody that is seeking it. Everybody that is seeking it.

Q. 20. Will you name some of the agencies beside your own members through which you reach the boys?

A. Reach them through Boy Scouts of America, Y. M. C. A., colleges, schools, Salvation Army, organizations organized for the safeguarding of the health and morals of boys—a great many different organizations.

Q. 21. Through what agencies do you reach grown people?

A. International Education Association, Parent-Teacher Association, through Salvation Army, women's clubs, men's clubs, and a great many other organizations and adult organizations, too numerous to mention.

Q. 22. In how many forms do you distribute your educational matter?

A. Through printed matter, pamphlets, letters, correspondence, moving picture films, lecturers—any way it is desired or suggested by those who wish our co-operation.

Q. 23. About how many pieces of printed literature do you send out per month?

A. Well, up to about a year ago, when we were working alone, we sent out about 17,000 a month. Since then we have quite a number of co-operating agencies who are making a great demand upon us for our literature. I may say we are sending out 100,000 copies a month. I shouldn't be surprised if we would soon be sending out a half million a month.

Q. 24. Do you send out larger quantities at times?

A. Whenever there is any special demand for a large quantity, we try to do our best to fulfill the demand.

Q. 25. Can you give an instance?

A. For instance, the Salvation Army is putting on a

Smokeless Sunday, and it should use, I believe, about one million copies.

Q. 26. Have you any of this printed literature with you?

A. Yes, I have some here illustrative of what we are sending out.

Q. 27. Were these printed by the International Anti-Cigarette League?

A. Yes, sir.

Q. 28. Did you get these out of the regular supply from which you distribute?

A. Yes, sir. That is a lot illustrating what we are sending out. That is not all.

The collection of material produced by the witness, comprising fourteen pieces bound together in a book, is offered in evidence, as Plaintiff's Exhibit No. 9, "Fairfield Illustrative Collection Anti-Cigarette Literature."

Mr. Cavanagh: The above testimony and the exhibits objected to as immaterial and irrelevant to this issue.

(The witness continues his answer.) I might also say, when a few minutes ago I was mentioning some of the ways in which we were reaching the boys, that we also reach the boys through the Rotary Clubs and the Boys' International Clean Life Army.

Q. 29. Do your allied organizations distribute this literature for you?

A. Yes. Well, I wouldn't say for us. They distribute for themselves as well as us. They are quite as much interested in the welfare of the boys as we are.

Q. 30. How else do they co-operate with the League?

A. By exhibiting our moving pictures. By using lecturers. Well, various ways—anything to extend the information which we have obtained with reference to the cigarette and tobacco.

Q. 31. Will you please name some of the organizations that are officially allied with your League?

A. Boys' Club Federation.

Boy Scouts of America.

Boys' Workers Association.

Chicago Boys' Club.

Chicago Federation of Settlements.

Chicago Sunday School Association.

Department of Education, Chicago, through Peter A. Mortensen, the Superintendent of Schools.

Juvenile Protective Association.

Lower North Community Council.

Salvation Army.

Union League Foundation for Boys' Clubs.

National Education Association.

Illinois Federated Parent-Teacher Association.

Y. M. C. A.—Young Men's Christian Association, if you please.

Federated Women's Clubs.

Woman's Christian Temperance Union.

Boys' International Clean Life Army.

Rotary Clubs, and a good many others, too numerous to mention.

Q. 32. How are the Rotary Clubs interested in the work of the League?

A. Why, we co-operate with them in the organization of the Boys' International Clean Life Army. I also wish to say they show our moving picture films. They are very much interested in the welfare of the boy. They do all they can to promote the welfare of the boy, of the youth of the country, they distribute our literature, we co-operate in any way that's for the benefit of the boy, to protect them from acquiring the cigarette habit and to promote the best interest of the boy.

Q. 33. Just briefly, what are the Rotary Clubs?

A. The Rotary Clubs are organizations of the cities, villages and towns, not only the United States, but foreign countries, composed of the medium business and professional men, the leaders in their communities, organized for the mutual benefit of the community and one of their objects stands out very prominently. It is the welfare of the boy. They do a great deal for the benefit of the boy.

Q. 34. What is the Boys' Clean Life Army?

A. The Boys' Clean Life Army is part of our organization, the members of which pledge themselves to refrain from the use of cigarettes and tobacco, or intoxicating liquors, and lead a moral life until they are twenty-one years of age. It was organized with the co-operation of the Rotary Clubs.

Q. 35. About how many families does your League reach; that's in the United States?

A. Well, we reach some six hundred thousand (600,000) through the Boy Scouts of America. It is safe to say we reach a million families.

Q. 36. How do you find the public receives your ideas?

A. They are very receptive.

Q. 37. How do you know this?

A. Not only our ideas, but the ideas of a very large percent of the citizens of the United States. We know that by the great number of letters of inquiry which we receive about our work and about the requests we have for the prescription for the cigarette and tobacco cure.

Q. 38. Have you with you any illustrative specimens of these letters of which you have just spoken?

A. I have a very few here.

Q. 39. Were these letters received in the regular course of business of the League?

A. They were.

Q. 40. Did they go over your desk?

A. They did. Went through it.

Q. 41. Do you produce them from the files of the League?

A. Yes.

Q. 42. Are these photostatic copies of this collection of letters?

A. Yes.

The witness produces a collection of letters, and it is stipulated by and between the counsel that photostatic copies of the letters may be received in evidence in lieu and with the same force and effect as the originals. Collection of photostatic copies is produced, offered and introduced in evidence as Plaintiff's Exhibit No. 10, Fairfield Illustrative Collection of Letters Received by Anti-Cigarette League.

Q. 43. Mr. Fairfield, what did the Anti-Cigarette League do during the late war?

A. Ceased activities.

Q. 44. Why was that?

A. The Government was furnishing the Army and Navy with cigarettes.

Q. 45. When did the League resume its operations?

A. After the war.

Q. 46. Why was that?

A. On account of the reaction we saw coming.

Q. 47. Is that reaction actually taking place?

A. It is.

Q. 48. How do you know this?

A. From quantity of letters we receive in reference to our activities, for information, literature, from the amount of applications we have for the cigarette cure, for the prescription for cigarette cure—a great many of those come from ex-service men who formed the cigarette habit while in the war.

Q. 49. Do you find any opposition to your activities?

A. The only opposition I have ever discovered is from the tobacco interests, who have become alarmed with our activities and are taking action to counteract what we are doing, the excitement that is being created since the war.

Q. 50. Can you give an instance of effort to counteract your activities?

A. The allied tobacco industries was formed, to hold an exposition at the Coliseum in Chicago in September last, to counteract the nation wide agitation against smoking, for their self preservation, and to increase the interest of the people engaged in that industry to protect their interests.

Q. 51. How did you hear of this exposition?

A. Through a letter that was written by them in June last, notifying of the intention to hold this exposition, and over the telephone—a conversation with its manager. We asked about securing space in the Coliseum at the time of this exposition.

Q. 52. Have you this letter with you?

A. I have.

Q. 53. Did this letter come to you in the regular course of your business?

A. It did.

Q. 54. Do you produce it out of the files of the International Anti-Cigarette League?

A. I do.

Q. 55. Is this a photostatic copy?

A. Yes.

Photostatic copy of the letter just produced by the witness is produced, introduced and offered in evidence as Plaintiff's Exhibit No. 11, Allied Tobacco Industries Exposition Letter. It is stipulated that the photostatic copy may be offered and introduced with all the force and effect of the original.



By Mr. Cavanagh: The same objection of immateriality and irrelevancy as pertains to the letters heretofore produced by this witness, was made as to this letter and the testimony concerning the same.

Q. 56. Mr. Fairfield, does your League keep in touch with legislation in the various states on the tobacco and cigarette question?

A. Yes.

Q. 57. Has any legislation prohibiting or regulating the use of tobacco in any of the states been passed?

A. Four of the states have laws prohibiting the sale of cigarettes and a great many of them have laws prohibiting the sale of cigarettes to minors. There is also legislation pending in several states now.

Q. 58. Mr. Fairfield, I show you a package of cigarettes, now in evidence in this case as Plaintiff's Exhibit No. 1. Have you ever seen a package of those cigarettes before?

A. Yes, sir. Many times.

Q. 59. Where have you seen them?

A. I first saw them in the hands of boys. I have seen them on sale and on display at cigar—tobacco stores.

Q. 60. When you first saw them, who did you think was the maker of them?

A. Beech-Nut Packing Company.

Q. 61. Why did you think that?

A. The name and label on it.

Q. 61a. When you saw them afterwards, whose product did you think they were?

A. I always thought they were the product of the Beech-Nut Packing Company, until I was advised a few weeks ago by Mr. Hinton.

Q. 62. What did you think of the Beech-Nut Packing Company for making a cigarette?

A. Well, I always had a very high regard for the

Beech-Nut Packing Company. They had advocated purity in products during their entire existence. I presumed everything that they produced was pure until I saw that they were putting out a cigarette. I presumed that they were on account of their name, label on it. And I thought they were degenerating—going down hill. Trying to impose upon the people by claiming that they could produce a pure cigarette, taking advantage of the good name that they had created for a great many years for purity of product. Taking advantage of the people by getting them to accept the cigarette under the guise of purity.

Q. 63. Would you use Beech-Nut products while you were under that impression?

A. Not if I knew it.

Q. 64. How do members of the International Anti-Cigarette League and its sympathizers look upon cigarettes and the makers of cigarettes?

Mr. Cavanagh: That question is objected to as calling for hearsay.

A. Why, they condemn the cigarette and the manufacturers the same as I do.

Mr. Cavanagh: In so far as this witness' testimony pertains to the history of the anti-cigarette campaign and the documents produced in connection therewith, all this line of testimony is objected to as immaterial and irrelevant, because not pertinent to the issue in this case, and such objection is also applied to any exhibits produced in connection with this line of testimony, and it is stipulated by and between counsel for the parties that such objection may stand as if made to each question pertaining to such line of examination.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 65. Mr. Fairfield, did you ever personally purchase a package of these Beech-Nut cigarettes?

A. No, sir.

X-Q. 66. Like Plaintiff's Exhibit No. 1?

A. No, sir.

X-Q. 67. Did you ever smoke any of these Lorillard Beech-Nut cigarettes?

A. No, sir. I never did, I am sure.

X-Q. 68. You never took the trouble to look at a package of those cigarettes to see whose name was on it as maker, did you?

A. Well, I can readily see the name "Beech-Nut" and the Beech-Nut label.

X-Q. 69. Do you see the name P. Lorillard on it?

A. Yes.

X-Q. 70. Did you ever hear of P. Lorillard Company?

A. Yes, sir.

X-Q. 71. Large manufacturers, aren't they?

A. I believe they are.

X-Q. 72. As a matter of fact, in connection with your anti-cigarette work, you know that the P. Lorillard Company is one of the largest tobacco manufacturers in the United States?

A. I believe they are. Yes.

X-Q. 73. It is really an enormous concern. You know that from your business?

A. I understand it is.

X-Q. 74. You don't find the name of the Beech-Nut Packing Company on that package of cigarettes, do you?

A. Not the "Packing Company." I don't.

X-Q. 75. You find Lorillard's name on there, and not that of Beech-Nut Packing Company; you would presume that was Lorillard's product, would you not?

A. I didn't examine closely. Beech-Nut here in three

places. Most prominent, and I always was of the impression that that was put out by the Beech-Nut Packing Company until Mr. Hinton advised me otherwise.

X-Q. 76. If you see Lorillard's name on a package of cigarettes, wouldn't you think that was the Lorillard tobacco people?

A. I don't know whether I would or not.

X-Q. 77. If you saw Armour's name on a piece of goods, would you think that was Armour's?

A. It depends upon what else I saw upon the package.

X-Q. 78. You mean to say that a manufacturer's name on a package wouldn't mean a thing to you?

A. I didn't say that.

X-Q. 79. Suppose you see the name General Electric Company on a piece of electrical apparatus. Wouldn't that indicate that that was manufactured by General Electric Company?

A. If there was nothing else. Depends upon what else was on a package.

X-Q. 80. If you see two manufacturers' names on the package?

A. I presume I wouldn't know.

X-Q. 81. Right on that point. Do you find the name Beech-Nut Packing Company on that cigarette package?

A. No, but I find their label here and their name more prominent than anything else.

X-Q. 82. Where do you find their name—the Beech-Nut Packing Company—on that package? You said you find their name on it.

A. Beech-Nut and the label.

X-Q. 83. You mean the word "Beech-Nut"?

A. Yes.

X-Q. 84. But you don't find the name of the Beech-Nut Packing Company on it, do you?

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A. I don't find the words "Packing Company."

X-Q. 85. You don't find the words "Beech-Nut Packing Company"?

A. No. I didn't say that was the name of the corporation.

X-Q. 86. You really don't know the name of the corporation?

A. I shouldn't say that. I have always been governed by the word "Beech-Nut." That was their brand.

X-Q. 87. Did you ever hear of the Beech-Nut Packing Company—the food products people—putting out tobacco products?

A. No.

X-Q. 88. Now, as I understand from your direct examination, you approved of the food product goods of the Beech-Nut Packing Company, did you not? You said they stood for purity and the like.

A. I said that.

X-Q. 89. So you would have no objection to dealing with the Beech-Nut Packing Company in connection with its food products, would you?

A. Not until I understood that they were putting out cigarettes.

X-Q. 90. Leaving aside the question of putting out cigarettes for a minute, so long as they put out food products, such as bacon, preserves, chewing gum, candy, you had no objection to dealing with them, when you approved of those products, did you?

A. So long as I believed that they were putting out pure products, I had no objection to dealing with them.

X-Q. 91. Well, don't you consider preserves to be just the same as cigarettes or tobacco products?

A. Absolutely not.

X-Q. 92. Do you consider chewing gum to be in the same class as cigarettes or tobacco products?

A. Absolutely not. Now, I don't know anything harmful in gum.

X-Q. 93. Do you know of anything harmful in cigarettes or tobacco products?

A. Yes.

X-Q. 94. What?

A. I know the effect they have upon the boy.

X-Q. 95. I understand from some of your literature which you have produced that it is harmful to the human being in the opinion of those preparing that letter, in various ways?

A. It is harmful to them. You will have to consult the people who prepared that letter as to what their opinion is.

X-Q. 96. You don't stand sponsor for this literature you have produced?

A. What do you mean by sponsor?

X-Q. 97. You don't believe in what's set out in that literature?

A. Yes, sir.

X-Q. 98. So that literature represents your opinion as to the use of tobacco?

A. I didn't say that.

X-Q. 99. Now, you don't object to the use of chewing gum, do you?

A. I have never had any objection.

X-Q. 100. But you do object to the use of cigarettes, do you not?

A. I haven't said that I objected to their use.

X-Q. 101. But aren't you one of the officers engaged in the anti-cigarette campaign?

A. Yes, sir.

X-Q. 102. Without meaning at all to be impertinent, you wouldn't engage in an anti-cigarette campaign unless you objected to the use of cigarettes, would you?

A. We are seeking to protect the health and morals of boys.

X-Q. 103. Well, don't you believe that the use of chewing gum and candy is harmful to the health and morals of boys?

A. Not necessarily.

X-Q. 104. Don't you consider candy and chewing gum to be just the same as tobacco products?

A. The same?

X-Q. 105. Yes.

A. I didn't know there was much similarity.

X-Q. 106. You consider them to be entirely different?

A. What's that?

X-Q. 107. You consider them to be different—chewing gum and candy to be different from tobacco?

A. They don't seem to have the evil effects upon children that cigarettes do. I mean, candy and chewing gum don't have the same bad effects that tobacco would have.

X-Q. 108. I understand from your various official positions that you have stated that you do not personally approve of the use of tobacco products, particularly cigarettes, and therefore you are frankly engaged in forwarding an anti-cigarette campaign. You know that the cigarette or the tobacco industry is a segregated or separate industry in itself, isn't it? That is, a food product manufacturer doesn't usually make tobacco products and the tobacco manufacturer doesn't usually deal in food?

A. I haven't made any study of that.

X-Q. 109. Oh! I thought that you had made some study of the tobacco industry. Do you know how cigarettes are made?

A. Not exactly.

X-Q. 110. Do you know how the tobacco is treated to remove the nicotine and other by-products?

A. Not exactly.

X-Q. 111. Do you know how much nicotine remains in cigarette tobacco after it has been through the nicotine extractor?

A. Never analyzed it.

X-Q. 112. As a matter of fact, you didn't know they used a nicotine extractor in making cigarette tobacco?

A. I haven't given the matter much of any study.

X-Q. 113. Have you ever been through one of the big tobacco manufactories, when they are making cigarettes?

A. No.

X-Q. 114. So you don't know how the raw leaves are treated, or the tobacco separated or blended or the nicotine or other by-products extracted?

A. No, sir.

X-Q. 115. You are not familiar with the manufacturing process?

A. No.

X-Q. 116. You don't chew tobacco, Mr. Fairfield?

A. Chew? No.

X-Q. 117. You don't smoke cigarettes, do you?

A. Not now.

X-Q. 118. I understood you in your direct examination to say that the Rotary Clubs of this country were engaged in supporting, or rather I might say, forwarding your anti-cigarette campaign; is that correct?

A. That's a fact.

X-Q. 119. Have these Rotary Clubs any central headquarters or central point as an organization, or are they merely individual clubs?

A. They have a general organization.

X-Q. 120. Do you know where that central headquarters is located?

A. Yes, sir.

X-Q. 121. Where?

A. Chicago.



X-Q. 122. Do you know who is in charge there?

A. Secretary?

X-Q. 123. Secretary and president.

A. Chesly Perry is the secretary.

X-Q. 124. Headquarters of these Rotary Clubs is in Chicago?

A. Yes.

X-Q. 125. Now, I understood you to also say that, in your direct examination, the scope and extent of your Anti-Cigarette organization has grown a great deal recently, that is, since the war?

A. Yes.

X-Q. 126. Do you know how much or in what proportion the tobacco and cigarette business has grown since the war?

A. No, I don't.

X-Q. 127. You don't know how the present 1921 or 1922—say—output of tobacco products, especially cigarettes, compares in volume and value in dollars and cents with the output in—say—1914 and 1915?

A. How it compares?

X-Q. 128. You cannot say whether it has increased or decreased?

A. Yes, sir.

X-Q. 129. What do you think?

A. Increased.

X-Q. 130. It has increased? Prior to the passage of the Eighteenth Amendment were you engaged in the anti-liquor campaign?

A. No.

X-Q. 131. Never were in that?

A. No.

X-Q. 132. Simply opposed to the tobacco business?

A. I wouldn't say that. I haven't taken any active part in anti-liquor campaign.

X-Q. 133. But you do take part in the anti-tobacco campaign?

A. I think we would be better off without it. So do you.

X-Q. 134. Now, I cannot say that I do think so. Now, I understood you to testify in your direct examination that certain states had passed laws against the use of cigarettes or tobacco, or at least in a general way placed certain general restrictions on it. You have also testified that you are a lawyer by profession. You don't know of any provision in the Constitution of the United States that prohibits the sale of tobacco and cigarettes, do you, Mr. Fairfield?

A. In the Constitution?

Mr. Cavanagh: Yes.

A. No.

X-Q. 135. You do know that the tobacco manufacturers pay large revenue taxes to the United States on tobacco, cigarettes and the like, don't they?

A. Yes.

X-Q. 136. So far as the United States Government goes, the tobacco and cigarette business is a legitimate business at the present time?

Mr. Hinton: Objected to as irrelevant and immaterial, and outside the scope of the direct examination. I don't think we ought to discuss the merits or demerits of the anti-tobacco campaign.

A. Not prohibited by the United States law.

X-Q. 137. Tobacco and cigarettes are sold in the United States under the laws of the United States, as shown by the revenue stamp on the box, are they not?

A. It is apparent that there is no federal statute prohibiting their sale.

X-Q. 138. They are permitted to be sold under certain conditions and upon the payment of certain taxes?

A. Apparently, if they are not prohibited.

X-Q. 139. You never went into a store to buy a pack of these Lorillard Beech-Nut cigarettes like Plaintiff's Exhibit No. 1, thinking that they were a package of cigarettes made by Beech-Nut Packing Company, did you?

A. I never bought a package of them.

X-Q. 140. As I understand it, to sum up the whole matter, you think that tobacco products like cigarettes are entirely different class of goods from food products, don't you?

A. Tobacco is different from food.

X-Q. 141. Yes. And you wouldn't buy food products or chewing gum or candy, if you called for tobacco, and *vice-versa* you wouldn't buy tobacco if you called for chewing gum?

A. Not if I were in my right mind. If I wanted a food and I was sane, I wouldn't buy tobacco in its place.

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 142. Mr. Fairfield, up to the time, as you have testified, when you were told by Mr. Hinton that these cigarettes, Plaintiff's Exhibit No. 1, were not made by the Beech-Nut Packing Company, was there any doubt in your mind that they were made by Beech-Nut Packing Company?

A. Why, I supposed, of course, that they were made by Beech-Nut Packing Company. Most prominent thing on the package. You have to look closely to see the name of P. Lorillard.

R-D. Q. 143. Do I understand, Mr. Fairfield, that the work of the International Anti-Cigarette League is confined exclusively to combatting the cigarette habit in boys?

A. No.

R-D. Q. 144. I find, for instance, in this illustrative literature of yours, various passages, such as, for instance, "Men in middle life with a fixed tobacco habit of years, after reading our scientific literature are impelled to stop smoking, etc." Is it a fact that you combat the cigarette habit wherever you find it, among adults as well as boys?

A. We combat the tobacco habit—the use of tobacco, in any form, and we send out information, scientific information, which is the result of laboratory investigations, as to the effect of tobacco on the human system. Our moving picture films illustrate the ill effects of tobacco on the vital organs of the human body, and we are endeavoring to educate people of all ages as to the effect of tobacco on their systems.

Redirect examination closed.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 145. With this Anti-Cigarette League, are you on a retainer or salary with that League?

A. No, sir.

R-X Q. 146. Do all the work free, without any compensation whatsoever?

A. Not only devote my time without a penny's compensation, but I contribute money to its support.

R-X Q. 147. So that you are first and last opposed to tobacco and the use of tobacco in all its phases and all its works?

A. I think—I know tobacco is injurious to a human system.

R-X Q. 148. Now, I think, you have said that you thought this cigarette package was put out by the Beech-Nut Packing Company because of the label. Do you know what the regular label of the Beech-Nut Packing Company looks like?

A. I have seen it a great many times.

R-X Q. 149. Can you look at that cigarette package and tell me if that label is like the Beech-Nut Packing Company label?

A. It resembles it.

R-X Q. 150. In what respects?

A. When I looked at that I thought, of course, that was a Beech-Nut Packing Company's label.

R-X Q. 151. Because of that Beech-Nut?

A. The whole label on there.

R-X Q. 152. I show you a Beech-Nut Packing Company label. Has that cigarette label got that wide red band, with that word Beech-Nut printed on it?

A. A good deal of writing on there.

R-X Q. 153. Has it that red band on there?

A. It doesn't have the red band just like that there one.

R-X Q. 154. It hasn't a beech-nut in the middle, with two green leaves?

A. This has two beech-nuts.

R-X Q. 155. And no green leaves; is that right?

A. No.

R-X Q. 156. And there are some differences between the labels, to cut this short?

A. There are differences between this thing which you show me and the label on the Beech-Nut cigarettes, which I doubt if a person would notice without close inspection.

R-X Q. 157. And, as I understand it, you never took the trouble to look at or inspect this pack of cigarettes when you saw it in the store?

A. I didn't take the trouble to inspect it closely.

Mr. Cavanagh: That's all.

Deposition closed.

Signature waived.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT  
OF NEW JERSEY.

Beech-Nut Packing Company }  
vs. } Equity No. 3056.  
P. Lorillard Company. }

## STIPULATION.

It is stipulated by and between the parties, that a book marked by the notary, acting as Special Examiner by consent of counsel, as follows: "Plaintiff's Exhibit No. 12 (A to A 11)" and containing thirty-seven sheets, may be offered and received in this case. It is stipulated that this book contains the following subject-matter:

Plaintiff's Exhibit No. 12-A is a circular letter sent out by Lorillard Company under date of June 22, 1921, to jobbers and distributors; and it is stipulated that this exhibit is a sample of a general circular letter sent out on or about that date to jobbers and dealers distributing the Lorillard Beech-Nut cigarettes, subject to correction, if error appear.

Plaintiff's Exhibit No. 12-B is a circular letter from the P. Lorillard Company, sent out under date of August 4, 1921, and it is stipulated that this exhibit is a sample of a general circular letter sent out on or about that date to jobbers and dealers distributing the Lorillard Beech-Nut cigarettes, subject to correction if error appear.

Plaintiff's Exhibit No. 12-C; it is stipulated that this is a printed circular generally distributed by the Lorillard Company to jobbers and dealers in the states mentioned therein on or about October 27, 1921. Each of the foregoing three circular letters relates to defendant's Beech-Nut cigarettes, Plaintiff's Exhibit No. 1.

Exhibit No. 12 (D and E) are a letter and its envelope, received in ordinary course of business of the plaintiff, and the enclosure therewith, respectively.

Exhibits 12 (F and G) are, respectively, a letter and its envelope, and enclosure, received by Beech-Nut Packing Company in due course of business.

Exhibits No. 12-H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V and W are letters received by Beech-Nut Packing Company in due course of business.

Exhibit 12-X is original correspondence with American Grocery Society, Inc., comprising a letter from the Beech-Nut Packing Company and American Grocery Society reply thereto, of June 26, 1920.

Exhibits No. 12-Y, Z, A-1, A-2, A-3, are original letters received in due course of business by Beech-Nut Company.

Exhibit No. 12-A-4 is a letter written to Beech-Nut Packing Company by Engels Company, of New York, and the torn sign attached thereto is the sign referred to in the letter.

Exhibit No. 12-A-5 comprises a letter received in due course of business by Beech-Nut Packing Company, under date of October 15, 1920, the regular office copy of the reply thereto of October 30, 1920, and the original reply to the letter, of November 6, 1920, all transpiring in due course of business.

Exhibit No. 12-A-6, A-7, A-8, A-10 and A-11 are original letters received in due course of business.

It is stipulated by and between the counsel hereto that each of the letters and documents of Plaintiff's Exhibits No. 12-D to 12, A-11 inclusive, was received or dispatched in ordinary course of business, is genuine and authentic and was signed by the person whose name appears thereon—subject to the following:

Defendant is herewith supplied with photographic cop-

ies of each of the exhibits herein referred to for investigation thereof, and defendant reserves the right at any time before sixty days in advance of the trial, to challenge the authenticity and genuineness of any of the foregoing exhibits, and plaintiff in that event agrees to produce, where obtainable, the persons who signed the same, and subject them to examination by defendant, if so requested to do, or to prove the signatures by other testimony, failing which to withdraw the exhibit.

Defendant reserves the right to object to the foregoing exhibits on the ground of materiality and relevance.

Plaintiff calls upon defendant to admit the authenticity and genuineness of each of the foregoing exhibits, under the provisions of Equity Rule 58.

OFFIELD, POOLE, HINTON & SCOTT,  
Attorneys for Plaintiff.  
RICHARD B. CAVANAGH,  
Attorney for Defendant.

*State of Illinois, County of Cook, ss.*

I, Sarah E. Harvey, a Notary Public within and for the County of Cook and State of Illinois, do hereby certify that the foregoing deposition of Frank M. Fairfield was taken on behalf of Beech-Nut Packing Company, in pursuance of notice, before me, at the office of Offield, Poole, Hinton & Scott, 1737 First National Bank Building, in the City of Chicago, in said county on the 13th day of January, 1922; that said witness was by me duly sworn before the commencement of his testimony; that the testimony of said witness was taken by me stenographically and by me transcribed to writing; that the defendant herein was represented by counsel, Richard B. Cavanagh, Esq.; that said testimony was commenced



at 2:30 P. M., on the 13th day of January, 1922, and concluded on the same day; that the signature of the witness was waived by consent of counsel; that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter in controversy; and that I have received \$15.40.

In testimony whereof, I have hereunto set my hand and affixed my seal of office at Chicago, in said county, this 18th day of January, 1922.

SARAH E. HARVEY,  
Notary Public.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity, No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,		
<i>Defendant.</i>		

Depositions taken in behalf of plaintiff, before S. F. Davis, a Notary Public and Court Reporter, acting as Special Examiner, by consent of counsel, pursuant to notice and by agreement of counsel, at the residence of George B. Roach, on South Main street, in the City of Pembroke, Christian County, Kentucky, beginning Monday, January 16th, 1922, at 3 o'clock P. M.

Present: H. McClure Johnson, of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; and Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

GEORGE B. ROACH, a witness produced in behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to questions propounded by Mr. Johnson, deposed as follows:

*By Mr. Johnson.*

Q. 1. Your name is George B. Roach; your residence South Main street, Pembroke, Kentucky; your age 38 years; and your occupation grocer; is that correct?

A. Yes, sir.

Q. 2. Where is your grocery located?

A. North Main street, Pembroke, Kentucky.

Q. 3. What is the name of your concern?

A. G. B. Roach Grocery.

Q. 4. How long have you been doing business here?

A. About two years.

Q. 5. Have you handled any Beech-Nut products here?

A. Yes.

Q. 6. What ones, principally?

A. Beech-Nut butter, peanut butter, pork and beans, chewing gum.

Q. 7. Had you handled Beech-Nut products prior to your coming to Pembroke?

A. Yes, sir.

Q. 8. How long have you known of Beech-Nut products?

A. About as long as I can remember.

Q. 9. What have they stood for in your mind?

A. Well, a high-grade of quality.

Q. 10. Have you ever engaged in the tobacco business?

A. Yes, sir, I have traveled for a tobacco manufacturing company—the Brite Tobacco Company, of Bowling Green, Kentucky.

Q. 11. When did you first hear of Beech-Nut tobacco?

A. About a year ago.

Q. 12. How was that?

A. I saw some posters in a show window, at Bowling Green.

Q. 13. When you saw these posters, who did you think was putting out this Beech-Nut tobacco?

A. The Beech-Nut Packing Company.

Q. 14. Why?

A. Because the name and trade-mark on it resembled the same that were used by the Beech-Nut Packing Company.

Q. 15. I show you a package of Beech-Nut scrap tobacco, in evidence in this case as Plaintiff's Exhibit No. 3—when did you first see a package of this tobacco?

A. About the first of August, 1921.

Q. 16. Who did you think was putting out this tobacco when you saw the package?

A. I thought it was being put out by the Beech-Nut Packing Company.

Q. 17. Why?

A. Because the trade-mark and label resembled the same they were using.

Q. 18. Who was using?

A. The Beech-Nut Packing Company.

Q. 19. Who first showed you a package of this tobacco?

A. A traveling salesman that came into the store—said that he was here representing Beech-Nut tobacco—I don't believe he called it anything else at that time.

Q. 20. When was that?

A. That was along about the first of August—the first package I ever saw he showed it to me.

Q. 21. Did you handle this tobacco at that time?

A. No, I did not.

Q. 22. Did you have a package of it in your hand?

A. He gave me a package and told me to take it and use it and see how I liked it.

Q. 23. Did you buy any from him?

A. No, I did not.

Q. 24. Did he say whom he represented?

A. I don't remember that he did—he told me he was selling Beech-Nut tobacco.

Q. 25. What impression did he make as to who he represented?

A. Beech-Nut Packing Company.

By Mr. Cavanagh: That is objected to on the ground, Mr. Johnson, that no foundation has been laid showing that the witness had any idea who he was representing.

Q. 26. What made you think that?

A. Well, because he said in the conversation that I

knew the Beech-Nut trade-mark and knew what it stood for—anything put out under the Beech-Nut trade-mark had to be the highest quality.

Q. 27. What was the effect of his remarks on you?

A. Well, I was convinced that it was put out by the Beech-Nut Packing Company.

Q. 28. How long did your conversation last with him, about how long?

A. About fifteen minutes.

Q. 29. When did you learn definitely that this tobacco was made by someone else?

A. Mr. Hamilton, the salesman for the Beech-Nut Packing Company, came here, and I asked him why it was they were working two salesmen for the same company in the same district. He said they wasn't—why? I told him there was a Beech-Nut man here a few days ago selling tobacco, and he said it was a different concern.

Q. 30. Have you seen the Beech-Nut tobacco man again?

A. Yes.

Q. 31. When?

A. About two months later.

Q. 32. What occurred between you and him then?

A. Well, I told him that I understood that the Beech-Nut Packing Company was raising "Cain" about them using their trade-mark, and he said that they had sold the trade-mark to the Beech-Nut Packing Company, and had reserved the right to use the trade-mark on tobacco—he said that they had sued them once on the trade-mark and lost it, and he didn't think that they could gain it this time.

Q. 33. Do you know this tobacco man's name?

A. I have been told it was Bacon. Mr. Hamilton asked me who it was when he first learned of it, and a boy by the name of McCombs was working with me, and he re-

membered a remark that was made as he was going out the door—"he didn't know whether it was bacon or ham, but he didn't want either one."

Q. 34. Did he introduce himself to anybody in your store?

A. I suppose he did when he came in, is the reason the boy knew his name.

By Mr. Cavanagh: That is all hearsay, and calls for merely an opinion of what somebody else knew.

Q. 35. How many clerks did you have in your store?

A. One at the time.

Q. 36. Didn't he introduce himself to the clerk?

A. He did when he came back the third time—he came there three times.

Q. 37. What did he say his name was then?

A. Bacon.

Q. 38. Did he have any posters or advertising matter with him in your store?

A. Not that I saw.

Q. 39. Did he place any Beech-Nut tobacco signs while he was here in Pembroke?

A. I didn't see him place any, but the same day I saw some placed in Wood's drugstore and a display of tobacco.

Q. 40. Please describe this tobacco salesman.

A. Well, he was about five feet and a half tall, and weighed something like 150 or 60 pounds.

Q. 41. Did you see him the third time?

A. Yes, sir.

Q. 42. When was that?

A. That was about around November 21st.

Q. 43. What year?

A. 1921—I was out of the store at the time he called, and Mr. Bryan Foster, my clerk, told me that the Beech-Nut tobacco man had just called and said he would be

back in a few minutes—Mr. Bacon—but he didn't come back, and I saw him then in a few minutes afterwards get in a Ford car and drive off on the other side of the street.

Q. 44. Was there any mark on the car?

A. I think there was—I think there was a sign of Beech-Nut tobacco on it.

Q. 45. Was this the time he introduced himself to your clerk, Mr. Foster?

A. Yes, sir.

*Cross-Examined by Mr. Cavanagh, for Defendant.*

X-Q. 1. Mr. Roach, were you ever personally present when this man introduced himself as Mr. Bacon to your clerk?

A. No, sir.

X-Q. 2. So you weren't there at all when he said his name was Bacon?

A. Well, he introduced himself to me the first time he came in as Mr. Bacon—that is what I wouldn't swear whether Mr. Bacon or something else now.

X-Q. 3. But you were not present when he introduced himself to your clerk?

A. No, he merely told me Mr. Bacon had called on me while I was out.

X-Q. 4. So all of your answers as to what took place as between this alleged man, Bacon, and the clerk, is based on what the clerk told you, and not on your own personal knowledge—isn't that right?

A. He showed me the package of tobacco he gave him, and I know——

X-Q. 5. Now, in order to save time, when he was talking to the clerk, you weren't there, were you?

A. No, I was out of the store.

X-Q. 6. So, whatever he told the clerk is based on what the clerk told you?

A. Yes.

X-Q. 7. I understand you yourself met a person who showed you or handed you a package of Beech-Nut tobacco?

A. Yes.

X-Q. 8. Like this package of scrap tobacco (exhibiting package to witness)?

A. Yes, sir.

X-Q. 9. He didn't say he represented the Beech-Nut Packing Company, did he?

A. No, he said he was selling Beech-Nut tobacco.

X-Q. 10. You say you were in the tobacco business at one time?

A. Yes, sir.

X-Q. 11. When did you start in the tobacco business, and how long were you in it?

A. Well, I traveled a very short time, so far as that is concerned, a couple of months, during a vacancy I had between moves, from Bowling Green here.

X-Q. 12. About what year was that, or how long ago?

A. That was in 1920.

X-Q. 13. Didn't you ever hear of the P. Lorillard Company?

A. No, I couldn't say I ever heard of them.

X-Q. 14. You didn't know that the P. Lorillard Company was one of the largest tobacco concerns in the world?

A. No, sir, I did not.

X-Q. 15. You being in the tobacco business, but for a short while, must have been pretty familiar with some of the brands—did you ever hear of Climax chewing tobacco?

A. No, sir.



X-Q. 16. Did you ever hear of Egyptian Deity cigarettes?

A. What kind?

X-Q. 17. Egyptian Deity.

A. No, sir.

X-Q. 18. Did you ever hear of the Murad cigarettes?

A. No, sir.

X-Q. 19. Did you ever hear of the Mogul cigarettes?

A. No, sir.

X-Q. 20. You say the first time you ever saw this Beech-Nut tobacco like that Lorillard package of scrap tobacco was about a year ago, wasn't it?

A. Yes, sir—no, sir, I said last August.

X-Q. 21. Last August?

A. Yes, sir.

X-Q. 22. You yourself haven't the slightest idea how long that package of tobacco has been on the market, have you?

A. No, sir.

X-Q. 23. Did you sell tobaccos up there at your store?

A. Yes, sir.

X-Q. 24. What kind—what brands did you sell up there?

A. Well, I sold mighty near everything handled in this section of the country.

X-Q. 25. From whom did you buy your supply?

A. I bought a great many direct from the factory, but a good part of it from DeWerthern, at Hopkinsville.

X-Q. 26. Now, I understand that you have handled Beech-Nut Packing Company's food products, haven't you?

A. Yes.

X-Q. 27. You are very familiar with its label, are you not?

A. Yes, sir.

X-Q. 28. I show you a label, which is already in this case as Defendant's Exhibit No. —, Beech-Nut Label—does that represent the Beech-Nut Packing Company's Label?

(Witness examines label handed him.)

A. I was thinking they had two beeches—two of the nuts on it.

X-Q. 29. You mean in the middle here, where this nut is on the green leaf?

A. Yes, sir.

X-Q. 30. You thought that had two nuts?

A. Yes, sir.

X-Q. 31. So you couldn't say whether that was the Beech-Nut Packing Company's label or not?

A. Well, I have always taken it that everything put up in the Beech-Nut trade-mark belonged to one company—put up under the Beech-Nut label belonged to one company.

X-Q. 32. But outside of that—that doesn't quite answer my question—you don't know whether that is the Beech-Nut Packing Company's label or not, do you?

A. Well, I told you I thought they had the two nuts on it.

X-Q. 33. So you couldn't swear that was the Beech-Nut Packing Company's label, as you remember it?

A. Well, I would swear if a can of goods come out with that label on it—I would swear it was put up by the Beech-Nut Packing Company.

X-Q. 34. I asked you about the label I handed you, if you could identify that as the Beech-Nut Packing Company's label?

A. Well, now, I couldn't swear that was the Beech-Nut label here, if it was cut off the package.

X-Q. 35. Then, I understand your answer to be you couldn't identify that as the Beech-Nut Packing Com-

pany's label, you couldn't swear positively that was the label you knew before today?

A. No, I wouldn't swear that was absolutely it.

X-Q. 36. Now, will you look at that label a minute (referring to Beech-Nut Packing Company's label), there is quite a difference between those two labels (referring to label on package of scrap tobacco), is there not?

(Witness examines the two labels.)

A. Yes, when a man takes those and puts them right side by side, there is a difference—I can see a difference, but at an ordinary glance I wouldn't pay any attention to the difference.

X-Q. 37. So you didn't pay any attention to the label at all?

A. No—not in the same colors.

X-Q. 38. On this package of Beech-Nut scrap tobacco the name "P. Lorillard Company" is on that, isn't it?

A. Yes.

X-Q. 39. You don't find the name of the Beech-Nut Packing Company on that package, do you?

A. No.

X-Q. 40. You never saw a food product of the Beech-Nut Packing Company put up in any package that had those red radiant lines like that sun-burst?

A. No, sir.

X-Q. 41. And that package of tobacco hasn't got any red band with the word "Beech-Nut" printed on it, like that wide red band?

A. No, sir.

X-Q. 42. And the package of Beech-Nut scrap tobacco you have in your hand, that has got two beech-nuts on it, hasn't it?

A. Yes.

X-Q. 43. And in this case, it has got a single beech-nut on a green label, hasn't it?

A. Yes, sir.

X-Q. 44. So there is quite a difference between the label on that package and the label which I have shown you, isn't there?

A. Yes, sir.

X-Q. 45. Now, how long have you been in the grocery business all told?

A. Well, something over two years—two years and a half, I reckon.

X-Q. 46. And during that time what Beech-Nut products have you handled—that is, products of the Beech-Nut Packing Company?

A. Well, I have handled pork and beans and peanut butter, Beech-Nut chewing gum, catsup—is all I recall right now.

X-Q. 47. You never bought any tobacco products from the Beech-Nut Packing Company?

A. No, sir.

X-Q. 48. You never bought any scrap tobacco from the Beech-Nut Packing Company?

A. No, sir.

X-Q. 49. Never knew their salesman, Mr. Hamilton, to offer you any tobacco products for sale, did you?

A. No, sir.

X-Q. 50. You know that the tobacco business is an entirely different business from the food business, don't you?

A. Well, I can't say that I do.

X-Q. 51. Well, I thought you were in the tobacco business at one time—did Brite sell food?

A. But in the retail line they handle both.

X-Q. 52. I am not talking about the retail line—did Brite manufacture or sell any food products?

A. No, sir.

X-Q. 53. Did you ever hear of a tobacco manufacturer that did manufacture food products?

A. No, I don't know that I have.

X-Q. 54. And you never heard of a food manufacturer that manufactured tobacco products, did you?

A. Well, if a man knows, but some companies put out things they don't manufacture.

X-Q. 55. But I am asking you, do you know of any food concern that ever manufactured tobacco products?

A. No, I do not.

X-Q. 56. As I understand you, you folks down here in Kentucky are in the tobacco region, are you not?

A. Yes, sir.

X-Q. 57. The burley tobacco region?

A. Yes, sir.

X-Q. 58. Now, the tobacco industry down here has a distinct standing in itself—you make a crop of tobacco and strip it and ship it to the tobacco markets, and it is sold to tobacco people the world over?

A. Yes.

X-Q. 59. And it is a distinct industry from anything in the food line, isn't it?

A. Yes, sir.

X-Q. 60. Now, if a man came into your store and he wanted to buy a package of Beech-Nut chewing gum and asked you for that, you wouldn't hand him a package of that Beech-Nut scrap tobacco for chewing gum, would you?

A. Why certainly not—if he called for chewing gum, I would give him what he called for.

X-Q. 61. You would think he was crazy if he took tobacco when he called for chewing gum, or if he took chewing gum when he called for tobacco—you would think he was crazy if he did either one, wouldn't you?

A. Sure.

X-Q. 62. And without the intention in any way to be offensive at all—you would think you would be crazy to

give a man chewing gum when he wanted tobacco, or tobacco when he wanted chewing gum?

A. Yes.

X-Q. 63. And that is because chewing gum and tobacco are an entirely distinct character of goods—they have different uses?

A. Yes, sir.

X-Q. 64. They belong to entirely different classes, don't they?

A. Yes.

X-Q. 65. And it is the same way when you compare tobacco with baked beans and jellies and other food products—they are entirely different classes of goods, aren't they?

A. Well, they are used for different purposes.

X-Q. 66. They are different classes of goods—you consider tobacco to be different from food?

A. Sure.

X-Q. 67. Now, when this party that you say was Mr. Bacon came in your store, I understand he left you a package of this Lorillard scrap tobacco, did he not?

A. Yes.

X-Q. 68. And you never took the trouble to examine that package or to look at it and see whose product it was?

A. No, sir.

X-Q. 69. Didn't pay any particular attention to it at all?

A. No, sir.

X-Q. 70. And you didn't ask him to leave any credentials to show whether he was from the Lorillard Company, or any other company, did you?

A. No, sir.

X-Q. 71. He didn't leave any card showing who he represented, did he?

A. I don't remember it, if he did.

X-Q. 72. And for all you know, he might not have been from the P. Lorillard Company, isn't that so?

A. Well, I hardly think he would try to sell a "drop" shipment unless he was representing the company.

X-Q. 73. Well, there is one thing sure, he didn't say he was from the Beech-Nut Packing Company, did he?

A. No, sir.

X-Q. 74. So he made no misrepresentation at all as being from the Beech-Nut Packing Company, did he?

A. Well, he left me under the impression he was.

X-Q. 75. But he didn't say he was?

A. No, he did not.

X-Q. 76. Simply said he was selling Beech-Nut tobaccos, isn't that right?

A. Yes, sir.

X-Q. 77. And this Lorillard scrap tobacco has the name "Beech-Nut" on it, hasn't it?

A. Yes.

X-Q. 78. So he could say with perfect truthfulness he was selling that "Beech-Nut" scrap tobacco, couldn't he?

A. Yes, sir.

X-Q. 79. You don't handle any Beech-Nut tobacco or Beech-Nut cigarettes, do you?

A. Recently I have been handling Beech-Nut cigarettes.

X-Q. 80. Who did you buy them from?

A. DeWerthern, at Hopkinsville.

X-Q. 80a. So you didn't buy them from the tobacco manufacturer, but you bought them through a jobber—isn't that right?

A. Yes.

X-Q. 81. You buy those by the carton, don't you?

A. Yes, sir.

X-Q. 82. I show you a carton of cigarettes, already in evidence as Defendant's Exhibit —; is that the kind you buy?

A. Yes, sir.

X-Q. 83. That says, "Lorillard's Beech-Nut Cigarettes," doesn't it?

A. Yes, sir.

X-Q. 84. And you have opened a package of these cartons, have you not?

A. Yes.

X-Q. 85. And you have noticed in them certain yellow and white slips like these I show you?

A. Yes, sir.

X-Q. 86. This yellow slip which appears in this carton says, "Lorillard's Beech-Nut Perfect Cigarettes," doesn't it?

A. Yes.

X-Q. 87. And on these white slips, which are headed "Please Read," you find "P. Lorillard Company, Manufacturer, New York City," doesn't it?

A. Yes, sir.

X-Q. 88. There is no Beech-Nut Packing Company's name on these packages?

A. I know their boxes since I have handled them.

X-Q. 89. So you know these cigarettes are products of the P. Lorillard Company, don't you?

A. I do now.

X-Q. 90. And you know they are not products of the Beech-Nut Packing Company?

A. I know it now, but I didn't.

X-Q. 91. Well, you continued to handle them since you knew they were Lorillard's, haven't you?

A. Well, I knew they were before I started.

X-Q. 92. So you knew that before you first started to handle them?



A. Yes, on account of a conversation that came up between us on the second call.

X-Q. 93. So, when you bought those cigarettes and put them on sale, you didn't buy them on the belief they were products of the Beech-Nut Packing Company—you knew they were Lorillard's?

A. Well, I was perfectly satisfied they wasn't the Packing Company's, but I didn't know whose they were.

X-Q. 94. But the minute you look at the cigarettes, there is plenty of evidence to show they are Lorillard's, isn't there?

A. Yes, sir.

X-Q. 95. I understand that you handle those cigarettes right up to the present time?

A. I have handled them for the last few months.

X-Q. 96. And you have handled them up to the present time?

A. Yes, sir.

X-Q. 97. You are still handling the Beech-Nut cigarette, are you?

A. I was up until last Saturday night, when I was unfortunate enough to have a fire which caused me to temporarily close my store. This fire occurred last Saturday night in Pembroke, and practically destroyed the building.

*Redirect Examination by Mr. Johnson.*

R-D. Q. 1. You have already said on direct, Mr. Roach, have you not, that when you first saw the package of this Beech-Nut scrap tobacco and Beech-Nut tobacco posters, that you thought that the Beech-Nut Packing Company was the maker thereof?

A. Yes, sir.

R-D. Q. 2. When this tobacco salesman was in your store offering to sell his Beech-Nut tobacco the first time, you have already said he talked to you?

A. Yes, sir.

R-D. Q. 3. What impression did he give you from his conversation?

A. Well, I just thought he was representing the Beech-Nut Packing Company, from the fact that he said that all goods sold under the Beech-Nut brand had to come up to Beech-Nut reputation, and not knowing Beech-Nut tobacco, I naturally thought it was a Beech-Nut product.

R-D. Q. 4. Did you keep a general grocery store, Mr. Roach?

A. Yes, sir.

R-D. Q. 5. Did you sell tobacco and cigarettes?

A. Yes, sir.

R-D. Q. 6. Is that a common thing in the grocery trade?

A. Yes, sir.

*Re-Cross Examined by Mr. Cavanagh for Defendant.*

R-X Q. 1. Now, Mr. Roach, this man didn't say he was from the Beech-Nut Packing Company, did he?

A. Well, I have answered that.

R-X Q. 2. That he did not?

A. Yes, sir.

R-X Q. 3. I am awful sorry I have to make you answer again.

A. That is all right.

R-X Q. 4. And furthermore, you never took the trouble to find out who made this tobacco, did you—you didn't look at it carefully enough, did you—you didn't see Lorillard's name on it, and you didn't see the Beech-Nut Packing Company's name on it—wasn't enough interested?

A. Well, I didn't look for the name.

R-X Q. 5. That is what I say—you made no investigation as to who made it?

A. No, I did not.

R-X Q. 6. And this salesman didn't sell you any tobacco at the time at all, did he, of this Beech-Nut scrap tobacco?

A. He offered it for sale, but I didn't buy any.

R-X Q. 7. But he did leave a package with you?

A. Yes.

R-X Q. 8. And you could have looked at that package of tobacco that salesman left with you to your heart's content, if you wanted to, couldn't you?

A. Yes, sir.

R-X Q. 9. And you had the privilege of handing that package of Beech-Nut scrap tobacco over to the Beech-Nut Packing Company's agent whenever he called at your store thereafter, if you wished to do so?

A. I didn't have it when he called—I gave it to my father.

R-X Q. 10. So you wasn't enough interested in it to keep it?

A. I don't use it.

Signature waived.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity, No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,		
<i>Defendant.</i>		

CERTIFICATE.

*State of Kentucky, County of Christian, sct.*

I, S. F. Davis, a Notary Public in and for the county and state aforesaid, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing

deposition of George B. Roach was taken in behalf of Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, at Pembroke, Christian County, Kentucky, beginning Monday, January 16th, 1922; that said witness was by me duly sworn; that the testimony of said witness was taken down in short-hand by me and thereafter reduced to typewriting by me; that the opposing party hereto was represented by Richard B. Cavanagh during the taking of said testimony, and that the testimony was taken in Pembroke, Christian County, Kentucky, beginning at 3 o'clock P. M., and ending at 4 o'clock P. M., on January 16th, 1922; that the said deposition of the witness was read by said witness before signing same, except where the signature of the witness was waived, as indicated on the deposition.

I further certify that I am not connected by blood or marriage with either of the parties hereto, or interested directly or indirectly in the matter in controversy.

I also certify that I have been paid my fees as Special Examiner and for copies, in accordance with the attached bill, amounting to \$..... (See certificate on next succeeding deposition for amount of fees, etc.)

In witness whereof, I have hereunto set my hand and official seal, this 16th day of January, 1922.

My commission expires February 24th, 1923.

S. F. DAVIS,  
Notary Public, Christian County, Ky.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity, No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,		
<i>Defendant.</i>		

Depositions taken in behalf of plaintiff, before S. F. Davis, a Notary Public and Court Reporter, acting as Special Examiner, by consent of counsel, pursuant to notice and by agreement of counsel, at the residence of George B. Roach, on South Main street, in the City of Pembroke, Christian County, Kentucky, beginning Tuesday, January 17th, at 1:50 P. M.

Present: H. McClure Johnson, of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; and Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

BRYAN O. FOSTER, a witness produced in behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to questions propounded by Mr. Johnson, deposed as follows:

By Mr. Johnson: Q. 1. Your name is Bryan O. Foster; your residence South Main Street, Pembroke, Kentucky; your age twenty-five years, and your occupation, clerk in grocery store of G. B. Roach Grocery; is that correct?

A. Yes, sir.

Q. 2. Where is the Roach grocery store?

A. It is on North Main.

Q. 3. What town?

A. In Pembroke.

Q. 4. How long have you been working for the G. B. Roach grocery store?

A. The last time since November, 1921, beginning November 21st.

Q. 5. Did you work for them before?

A. I did last fall.

Q. 6. Have you handled Beech-Nut Packing Company's products?

A. Yes.

Q. 7. Will you name some of them you have handled, please?

A. Handled Beech-Nut pork and beans, and peanut butter and chewing gum and mints.

Q. 8. Are you familiar with the Beech-Nut Packing Company's label?

A. Yes, sir, I think so.

Q. 9. I show you a package of Beech-Nut scrap tobacco, now in evidence in this case as Plaintiff's Exhibit No. 3—did you ever see a package of this tobacco before?

(Witness examines the package handed him by attorney.)

A. Yes, sir.

Q. 10. When?

A. The first time I remember was along in the summer.

Q. 11. When you saw it, who did you think was putting it out?

A. I thought the Beech-Nut Packing Company was putting it out.

Q. 12. Why did you think that?

A. Well, from the name and label I just supposed they were putting it out.

Q. 13. I show you a package of cigarettes, now in

evidence in this case as Plaintiff's Exhibit No. 1; have you ever seen a package of those cigarettes before?

A. Yes, sir.

Q. 14. When?

A. Well, the first time that I remember for sure was along in the fall.

Q. 15. When you saw it, who did you think was putting them out?

A. I thought the Beech-Nut people—Beech-Nut Packing Company was putting them out.

Q. 16. Why did you think that?

A. From the name of the cigarettes and label on them?

Q. 17. How long did you think this tobacco and cigarettes were put out by the Beech-Nut Packing Company?

A. Until the 21st day of November—I found out it was a different concern.

Q. 18. How did you happen to learn differently then?

A. Well, the Beech-Nut man—that is the tobacco man come in, and it happened that the Beech-Nut Packing Company's man was here the same day, and I asked Mr. Roach how come two men representing the Beech-Nut people were here the same day, and so he told me.

Q. 19. Did you talk to the Beech-Nut tobacco man when he came in that day?

A. Yes, sir.

Q. 20. Did he introduce himself to you?

A. Yes, sir.

Q. 21. What did he say to you at that time?

A. He come in and told me that he was Mr. Bacon, with the Lorillard Tobacco Company, and was handling that Beech-Nut cigarettes and tobacco.

Q. 22. Then what happened between you?

A. He looked over the stock of cigarettes and things

we had, and I told him Mr. Roach wasn't in, and so he said he would be back in a little while before he left town to see him again.

Q. 23. When did Mr. Roach come in?

A. Just as he was leaving.

Q. 24. What did you tell Mr. Roach at that time?

A. I told him there was—as well as I remember, I expressed it in this way: "There is a Beech-Nut tobacco man here," something like that, and told him he had just been in to see him.

Q. 25. Did you see him again?

A. Yes, sir, when he was leaving town, I pointed him out as he was leaving town and told Mr. Roach he wouldn't be back, he was leaving town.

Q. 26. How did he leave?

A. In a Ford roadster.

*Cross-Examined by Mr. Cavanagh for Defendant.*

X-Q. 1. What was the date you met this Lorillard tobacco man?

A. It was the 21st day of November.

X-Q. 2. About what time?

A. Well, it was in the afternoon, if I am not badly mistaken.

X-Q. 3. That date—the 21st day of November, 1921, was the first time you ever saw that man, wasn't it?

A. Yes—that I know of.

X-Q. 4. And as I understand you, he came into Mr. Roach's store and introduced himself as from the Lorillard Company?

A. Yes, sir.

X-Q. 5. And that he was selling this Beech-Nut scrap tobacco?

A. Yes.

X-Q. 6. And the Beech-Nut cigarettes?

A. Yes, sir.



X-Q. 7. And you told him that he would have to see Mr. Roach about putting this scrap tobacco and these cigarettes in stock, didn't you?

A. I told him I didn't do the buying—he would have to see Mr. Roach.

X-Q. 8. Yes—then he said he would return a little later?

A. Yes, sir, said he would see him before he left town.

X-Q. 9. And he told you his name was Mr. Bacon?

A. Yes, sir.

X-Q. 10. Now that date was the first time you had ever seen this man, wasn't it?

A. That I know of, yes.

X-Q. 11. The first time he had ever spoken to you and introduced himself?

A. Yes, the first time I had been introduced at all.

X-Q. 12. Have you ever seen that man since the 21st day of November, 1921?

A. Well, no, I don't recall seeing him since.

X-Q. 13. He hasn't been into your store and made any effort to sell you any tobacco since then?

A. Well, I wouldn't say that he hasn't been there since. I know he was there then.

X-Q. 14. But you personally, yourself, have never seen him since that time?

A. No, I don't know of him being there since then.

X-Q. 15. So that fact is taken as understood that that was the only time so far as you know, he was ever in your store?

A. Yes, sir.

X-Q. 16. And when he was there he said he was from the Lorillard Company and he was selling these tobaccos?

A. Yes, sir.

X-Q. 17. Now, when was it, as near as you can tell, the first time you ever saw a package of tobacco like this Lorillard scrap tobacco?

A. Well, it was in the latter part of the summer, in August, I believe.

X-Q. 18. Where did you see it?

A. At Hopkinsville.

X-Q. 19. You didn't buy any of it, did you?

A. No, it was given to me.

X-Q. 20. Who gave it to you?

A. Some traveling man come in the room I was in—in fact, there was eight or ten men in there—so he handed it out to anybody that chewed at all.

X-Q. 21. Did you chew any of the tobacco?

A. Yes, sir.

X-Q. 22. Pretty good chewing tobacco, isn't it?

A. A little sweet.

X-Q. 23. A little sweet, but good tobacco?

A. Yes, it is good tobacco, if they would leave the sweet off of it.

X-Q. 24. Tobacco chewers all have different tastes, don't they?

A. Yes.

X-Q. 25. You see Lorillard's name on that package, don't you?

(Witness examines package.)

A. Yes.

X-Q. 26. Will you look at it and see if you can find the Beech-Nut Packing Company's name on it any place?

A. No, I don't see the packing company's name on it.

X-Q. 27. So when this tobacco was handed you, you never even looked to see whose name was on it, did you?

A. Well, about all that struck me, I suppose, was that it was Beech-Nut stuff.

X-Q. 28. You didn't pay any attention to who made it—anything of that sort?

A. No, I don't know that I paid any attention as to who made it—I don't know that I did.

X-Q. 29. That didn't make any difference to you at that time at all?

A. Well, not right then I don't suppose it did.

X-Q. 30. Have you sold any of these Beech-Nut cigarettes?

A. Yes, sir.

X-Q. 31. When was the first time you saw a package of these Beech-Nut cigarettes?

A. It was along in the fall.

X-Q. 32. Where did you first see them?

A. Well, I was in Hopkinsville when I first saw them—I was there when they did a right smart Beech-Nut advertising—Beech-Nut cigarette advertising.

X-Q. 33. You didn't buy any of them, did you, that you recall?

A. No, I didn't buy any until after I started to work here—then I smoked some.

X-Q. 34. You notice P. Lorillard Company's name on that cigarette, don't you?

A. I do, yes, sir.

X-Q. 35. And when you said you first thought they were put out by the Beech-Nut Packing Company, the food people, you never took the trouble to look at the package and see whose name was on it, did you?

A. Well, before then I had seen them, but I wasn't for sure how the style of the Beech-Nut Manufacturer's name run.

X-Q. 36. You didn't know the name of the Beech-Nut Packing Company?

A. I didn't know for sure at that time.

X-Q. 37. You don't find the Beech-Nut Packing Company's name on that package, do you?

A. No, sir.

X-Q. 38. But you do find "P. Lorillard Company," on it?

A. Yes, sir.

X-Q. 39. You have heard of the Lorillard Company, have you not?

A. Well, not until I seen that tobacco, I don't know that I ever have, no, sir.

X-Q. 40. Have you ever sold much tobacco?

A. Well, I reckon a right smart.

X-Q. 41. You have sold these cigarettes (referring to cigarettes made by P. Lorillard Company) at Mr. Roach's store, have you?

A. Yes, sir.

X-Q. 42. They come in that kind of a carton I show you—a large carton like this, which has been put in evidence in this case Defendant's Exhibit No. —?

A. Yes, sir.

X-Q. 43. And that has "Lorillard's Beech-Nut Perfect Cigarettes" on it?

A. Yes, sir.

X-Q. 44. You don't find the Beech-Nut Packing Company's name on it?

A. No, sir.

X-Q. 45. Did you ever hear of or sell the Climax chewing tobacco—Climax plug?

A. Well, I haven't since I have been with him, no, sir.

X-Q. 46. Well, did you ever hear of it?

A. Yes, sir.

X-Q. 47. And to shorten this examination, you have heard of the Murad cigarettes, the Moguls, Egyptian Deities?

A. I am not sure about that.

X-Q. 48. You have heard of the Helmars?

A. Yes.

X-Q. 49. And the concern that makes all those cigarettes must be pretty prominent in the tobacco world, wouldn't you say?

A. Well, I don't hardly know about that.

X-Q. 50. But you know they are wide selling brands of cigarettes, don't you?

A. Well, we haven't the trade for them—they may be in some places; we don't have a trade for that class of cigarettes.

X-Q. 51. Do you use cigarettes?

A. Yes, sir.

X-Q. 52. You have seen those brands advertised and in cigar stores in Hopkinsville and elsewhere?

A. I have seen them advertised.

X-Q. 53. I understood you to say that you thought that this Lorillard Beech-Nut scrap tobacco was put up by the Beech-Nut Packing Company because of the label—are you familiar with the label of the Beech-Nut Packing Company?

A. Well, I considered that I was.

X-Q. 54. I show you a Beech-Nut Packing Company mint label, which is in this case as Defendant's Exhibit —, does that look like the Beech-Nut label?

A. Well, at a glance of the eye it does.

X-Q. 55. It has got the name of the Beech-Nut Packing Company on it, hasn't it?

A. Yes, sir.

X-Q. 56. You are familiar with this wide red band of the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 57. This stands out on all their packages, doesn't it?

A. Yes, sir.

X-Q. 58. And that has a single beech-nut in the middle on the green leaf?

A. Yes, sir—I hadn't noticed it hardly that close.

X-Q. 59. There is quite a difference between those two labels now, isn't there—look at them?

A. Yes, as far as the labels are concerned, get them both together there is quite a difference in them.

X-Q. 60. Now, you never knew the Beech-Nut Packing Company to put out any food products, or gum, or candy, in packages having those wide red lines like a sun-burst on it, did you?

A. The Beech-Nut Packing Company?

X-Q. 61. Yes.

A. No, I don't recall seeing it.

X-Q. 62. That sun-burst, I will call it, is pretty prominent on the package, you can tell it is Beech-Nut tobacco?

A. Yes.

X-Q. 63. You never knew the Beech-Nut Packing Company to sell packages of any of their food products that resembled in shape the package like this tobacco is put up in?

A. You mean in shape?

X-Q. 64. Yes, like this tobacco?

A. No, I never seen any of their packages shaped like that.

X-Q. 65. As a user of tobacco, you could tell that was a tobacco package, couldn't you?

A. Well, I think I could.

X-Q. 66. And you never knew them to put up any packages of stuff that looked like a package of cigarettes?

A. No, sir.

X-Q. 67. You can tell a cigarette package a mile off—it's got an individuality all of its own?

A. Yes, if I wanted to smoke I could.

X-Q. 68. As a matter of common sense a package of cigarettes has a shape and appearance all its own?

A. Yes, sir.

X-Q. 69. And you can readily tell them on the shelf of a store?

A. Yes, sir.

X-Q. 70. You never sold any tobacco products that you yourself knew came from the Beech-Nut Packing Company, did you—the food people?

A. Well, I didn't know they come from them—I thought they did.

X-Q. 71. No, I mean in your own mind and from your own knowledge, that came from the Beech-Nut Packing Company?

A. I never sold any tobacco I know now come from there, no sir.

X-Q. 72. You never heard of them putting out tobacco products as a matter of fact, did you?

A. No, I never have.

X-Q. 73. If a man came into your store and asked you for a package of Beech-Nut scrap tobacco or for a package of Beech-Nut cigarettes, would you sell him a package of Beech-Nut chewing gum, or Beech-Nut candy, or Beech-Nut food products in place of tobacco and cigarettes?

A. No, sir.

X-Q. 74. You would think that man was crazy if he took one for the other, wouldn't you?

A. Yes, sir.

X-Q. 75. And that is because they are an entirely different class of goods, aren't they?

A. Sure.

X-Q. 76. Tobacco is tobacco?

A. Yes, sir.

X-Q. 77. And it is recognized in the trade and by men

of common sense that tobacco isn't the same as chewing gum and food; isn't that right?

A. Yes, sir.

Signature waived.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,  
*Plaintiff.*

**U.S.**

In Equity, No. 3056.

P. Lorillard Company,  
*Defendant.*

### CERTIFICATE.

*State of Kentucky, County of Christian, Sct.*

I, S. F. Davis, a Notary Public in and for the county and state aforesaid, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing deposition of Bryan O. Foster, was taken in behalf of Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, at Pembroke, Christian County, Kentucky, beginning Tuesday, January 17th, 1922; that said witness was by me duly sworn; that the testimony of said witness was taken down in short-hand by me and thereafter reduced to typewriting by me; that the opposing party hereto was represented by Richard B. Cavanagh during the taking of said testimony; that the said testimony was taken in Pembroke, Christian County, Kentucky, beginning at 1:50 P. M. o'clock, January 17th, 1922, and ending at 2:15 P. M. o'clock, January 17th, 1922; that the said deposition was read by said witness before signing same, except where the signature of the witness was waived, as indicated on the deposition.

I further certify that I am not connected by blood or



marriage with either of the parties hereto, or interested directly or indirectly, in the matter of controversy.

I also certify that I have been paid my fees as Special Examiner, for this deposition and the deposition of George B. Roach hereto attached, and for copies taken, in accordance with the attached bill, amounting to \$37.00

In witness whereof I have hereunto set my hand and seal this the 17th day of January, 1922.

My commission expires February 24th, 1923.

S. F. DAVIS,  
Notary Public, Christian County, Kentucky.



Q. 5. How long?

A. Almost ever since I have been in business.

Q. 6. Please name some of them that you have handled.

A. Chewing gum, mints, breakfast bacon, peanut butter, jellies, macaroni, spaghetti.

Q. 7. What have you found, in your experience, to be the quality of Beech-Nut Packing Company's line of products?

A. It is high class.

Q. 8. How have they sold with you?

A. Good.

Q. 9. What does the Beech-Nut label on a line of goods mean to you?

A. It means quality.

Q. 10. Do you sell tobacco and cigars in your grocery store?

A. Yes, sir.

Q. 11. How long have you done this?

A. Ever since I have been in business.

Q. 12. Is it a common thing for grocery stores to sell tobacco?

A. With all of them in this section of the country.

Q. 13. Are you selling Beech-Nut chewing gum in your store at present?

A. Yes, sir.

Q. 14. Where do you expose this gum for sale?

A. In a case on top of the cigar case.

Q. 15. Are any other of the Beech-Nut products displayed for sale near your tobacco?

A. Well, I have got some on the shelf behind it, and in front of it, too.

Q. 16. How close is that to the tobacco?

A. Well, I would say that the jellies are right directly behind it, and peanut butter and breakfast bacon are right opposite the case, only a few feet.

Q. 17. I show you a package of Beech-Nut scrap tobacco, in evidence in this case as Plaintiff's Exhibit No.

3. Have you ever seen packages of this tobacco before?

A. Yes, sir.

Q. 18. Do you handle it?

A. Yes, sir.

Q. 19. When did you first know of it?

A. Why, four or five years ago; first time I ever saw it a salesman came into my place of business, and stated that he was selling Beech-Nut tobacco.

Q. 20. What occurred between you and the tobacco salesman at that time?

A. I told him that I didn't know that the Beech-Nut Packing Company put up tobacco, and he stated that this was a new product, or one of their new products.

Q. 21. What was the effect on you of this conversation?

A. Well, I am not certain that I bought Beech-Nut tobacco at that time, wouldn't say positive, but I think I did. We were perfectly willing to handle it alright enough, because we had been handling other Beech-Nut stuff, and thought the quality would be like all other Beech-Nut stuff.

Q. 22. What makes your memory of your conversation with the Beech-Nut tobacco salesman on the day you have told about, so clear in your mind?

A. Well, Mr. Mattox, who sells Beech-Nut stuff, was in the store at the time, and I told him that I didn't know that the Beech-Nut Packing Company put out tobacco, and he stated himself that he didn't know it either, that it wasn't on his list, he would find out about it.

Q. 23. Would you take this package for a Beech-Nut product?

A. Well, I can't say that. I will say that the Beech-Nut name is what appealed to me. I never paid so much

attention to the package as I did to the name that was on it. That's what impressed me.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 24. You say that it was about four or five years ago when this tobacco salesman first came into your store to sell you Beech-Nut tobacco?

A. Yes, sir.

X-Q. 25. And was Mr. Mattox, the Beech-Nut Packing Company salesman, in the store at that time?

A. Yes, sir.

X-Q. 26. So the two salesmen practically met in the store?

A. Well, I don't know that he met the other one there, but Mattox was in the store at the time.

X-Q. 27. And the salesman had sample packages of the Beech-Nut scrap tobacco, like this exhibit, there with him, did he not?

A. He had a package; I wouldn't say positively that it was that package, but I never saw one different from that.

X-Q. 28. But it had the red lines on it—as near as you can recollect, it had the same general appearance?

A. Near as I can remember, it was the same package.

X-Q. 29. And at that time this tobacco salesman didn't say he was from the Beech-Nut Packing Company, did he?

A. Not when he introduced himself. He said he was selling Beech-Nut tobacco.

X-Q. 30. Now, you have heard, of course, of P. Lorillard Company, have you not?

A. I hadn't heard of them at that time—until I looked at the package of tobacco.

X-Q. 31. Now, when you looked at the package, you saw the name Lorillard on it?

A. Yes, but not at that time.

X-Q. 32. I mean when you did take the trouble to look at it?

A. Yes.

X-Q. 33. And that indicated to you that it was a Lorillard tobacco product?

A. Yes, sir.

X-Q. 34. Now, I understand that you also handle in your store the various Beech-Nut food products?

A. Yes, sir.

X-Q. 35. And I further believe that your county, or neighborhood here, is more or less interested in the growth of tobacco—this is the tobacco section here in Kentucky, is it not?

A. Yes, sir, center of it.

X-Q. 36. You would never confuse a food product with tobacco, would you?

A. Not likely to.

X-Q. 37. You regard tobacco as an entirely different class of goods from bacon and chewing gum, do you not?

A. We regard them as a different thing, but we carry them both, if that's what you mean.

X-Q. 38. You do regard tobacco products as different from food products, do you not; that is, they have different uses and are different goods?

A. I don't understand exactly how you mean that. We consider tobacco as much a part of our line as we do the groceries.

X-Q. 39. Yes, but the tobacco industry is a distinct line of business in itself?

A. Oh, yes.

X-Q. 40. Just the same as steel or oils or grain are different lines of business—isn't that right?

A. Well, they are distinct lines of business to the men that handle tobacco alone, but with us they are not distinct lines of business.

X-Q. 41. Well, now, for instance, in your stores you sell a great many articles that are in no way related, do you not?

A. Yes, sir.

X-Q. 42. You sell brooms?

A. Yes, sir. Mops.

X-Q. 43. Washboards?

A. Washboards.

X-Q. 44. And these brooms, mops, washboards and other articles are in no way connected with food, are they?

A. Except that I sell them in the same store, as a part of my same stock.

X-Q. 45. But that is the only connection with them—a man wouldn't buy a broom to eat on his table for breakfast, would he?

A. Not much.

X-Q. 46. And a man wouldn't buy tobacco to eat for breakfast?

A. No, he wouldn't want it for breakfast; might want it beforehand.

X-Q. 47. If a person came into your store and wanted to buy some Beech-Nut bacon, or a package of Beech-Nut chewing gum, put out by the Beech-Nut Packing Company, you wouldn't hand him, or give him, a package of this Lorillard Beech-Nut scrap tobacco, would you?

A. Not apt to.

X-Q. 48. And you would think he was crazy if he took it when he wanted chewing gum or bacon, wouldn't you?

A. Of course.

X-Q. 49. You have never bought any tobacco from the Beech-Nut Packing Company, have you?

A. No, sir.

X-Q. 50. And you never knew them to sell any, did you?

A. No, sir.

X-Q. 51. You never knew the Beech-Nut Packing Company to put out a package in its line that looked like this Lorillard scrap tobacco package, did you?

A. No. The package itself didn't have any effect on me at all; just a matter of hearing the name, Beech-Nut Packing Company, in connection with the tobacco.

X-Q. 52. You mean simply the word Beech-Nut?

A. Yes, sir.

X-Q. 53. You never heard of, or saw, a package of the Beech-Nut Packing Company food products having that red sunburst or red radiating lines on it, did you?

A. No, sir.

X-Q. 54. And as a merchant engaged in the grocery business and in selling these various products, you can pick out that as a tobacco package, at a glance, wouldn't you?

A. I would now, knowing this package of tobacco.

X-Q. 55. As a matter of fact, if this package was on the shelf, with its red sunburst or radiating lines, and the general appearance of it—that lets you know it is the Beech-Nut tobacco package, doesn't it?

A. Of course.

X-Q. 56. And you can tell it from any other tobacco package, at a glance?

A. Yes, sir.

X-Q. 57. As I understand it, you are still buying this Lorillard Beech-Nut scrap tobacco?

A. Yes, sir.

X-Q. 58. It is quite a good seller for its kind, isn't it?

A. It's about as good a seller—really the only scrap tobacco we have at all.



X-Q. 59. And you have been buying it for a number of years, knowing it is Lorillard tobacco?

A. Yes, sir.

X-Q. 60. And you know the P. Lorillard Company has a good reputation for its manufactured tobacco?

A. Yes, sir.

X-Q. 61. So, having known for a number of years past that this was the Lorillard Company's scrap tobacco, you haven't the slightest objection to buying and selling this tobacco, have you?

A. None whatever.

X-Q. 62. You never heard of any tobacco manufacturing concern packaging and selling food products, did you?

A. Not that I know of.

X-Q. 63. And likewise you never heard of a food concern that was in the tobacco manufacturing business?

A. No, sir, only the impression that I got here.

X-Q. 64. Down here in Bourbon County and around this section of Kentucky, the tobacco industry is quite a business, as I understand it—that is, they have tobacco associations, and they have tobacco warehouses, and they have tobacco markets, for buying and selling the crop, and the like, have they not?

A. Yes, sir.

X-Q. 65. And these tobacco markets and warehouses, they don't store and sell food products or chewing gum, do they?

A. No, sir.

Signature waived by consent of parties.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,  
Plaintiff,

vs.

P. Lorillard Company,  
Defendant.

In Equity, No. 3056.

CERTIFICATE.

*State of Kentucky, County of Bourbon, ss.*

I, Mary T. Kenney, a Notary Public within and for the State of Kentucky, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing deposition of Charles P. Cook was taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before me at Paris, Bourbon County, Kentucky, on Friday, January 20th, 1922; that the foregoing witness was by me duly sworn; that the testimony of said witness was taken down in short-hand by me, and thereafter reduced to typewriting by me; that the opposing party hereto was represented by Richard B. Cavanagh during the taking of said testimony; that the testimony was taken in Paris, Kentucky, beginning at 10:30 o'clock A. M., and ending at 11 o'clock on Friday, January 20th, 1922; that the signature of said witness was waived by agreement of counsel, as indicated on the deposition.

I am not connected by blood or marriage with either of the parties hereto, or interested, either directly or indirectly in the matter in controversy.

I also certify that I have been paid my fees as Special Examiner, and for copies made, in accordance with the attached bill, amounting to \$7.47.

In witness whereof I have hereunto set my hand and official seal this 23rd day of January, 1922.

MARY T. KENNEY,

Notary Public, Bourbon County, Ky.

My commission expires January 13th, 1924.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity, No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,	}	
<i>Defendant.</i>		

Depositions taken on behalf of plaintiff before Garland A. Thomasson, a notary public, acting as Special Master by consent of counsel and pursuant to notice, and by agreement of counsel at the Pelton studio, 91½ North West Pack Square, and at Pennell's cigar store, 14 Patton Ave., Asheville, North Carolina, beginning Monday, January 23, 1922, at 10:15 A. M.

Present: Mr. H. McClure Johnson, of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; Mr. R. B. Cavanagh, of Meyers, Cavanagh, Whitehead and Hyde, for P. Lorillard Company.

H. W. PELTON, a witness produced on behalf of the plaintiff, pursuant to notice and agreement of counsel, being first duly sworn, and in response to interrogatories propounded by Mr. Johnson, deposes as follows:

By Mr. Johnson: Q. 1. Your name is H. W. Pelton?

A. Yes.

Q. 2. Your residence is 124½ Montford Avenue, Asheville, N. C.?

A. Yes.

Q. 3. Your age is forty?

A. Yes.

Q. 4. Your occupation professional photographer; is that correct?

A. Yes, sir.

Q. 5. Under what name do you do business, and where?

A. Pelton Studio, 9½ North West Pack Square.

Q. 6. What town?

A. Asheville, North Carolina.

Q. 7. Do you know the Pennell cigar store at 14 Patton Avenue, Asheville, North Carolina?

A. Yes, sir.

Q. 8. What floor in the building is it?

A. First floor.

Q. 9. Has it a front show window facing the sidewalk?

A. Yes, sir.

Q. 10. Did you ever photograph that show window?

A. Yes, sir.

Q. 11. When?

A. Yesterday, January 22.

Q. 12. What is the date?

A. January 22, 1922.

Q. 13. On whose instructions?

A. Mr. Atkinson's of the Beech-Nut Packing Company.

Q. 14. Did you take the photograph, develop it and print it yourself?

A. I took the photograph, and developed it and had someone else print it.

Q. 15. Someone in your studio?

A. Yes.

Q. 16. Is this photograph, which I show you, marked Plaintiff's Exhibit No. 13, Pennell's Cigar Store Window Display, the photograph you took of the Pennell cigar store front show window and display therein on January 22, 1922 (handing to witness)?

A. Yes, sir.

Mr. Johnson: This photograph, marked as I

have described, is introduced and offered in evidence as Plaintiff's Exhibit No. 13, Pennell's Cigar Store Window Display.

Q. 17. Does Pennell's name show on the window or front of his store?

A. No, sir, I have not seen it.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 18. What time yesterday did you take this picture?

A. Yesterday morning, somewhere between eleven and twelve.

X-Q. 19. And after you took the picture, what did you do, did you develop the plate right away?

A. Very soon afterwards.

X-Q. 20. Did you touch up the plate in any way at all?

A. No, sir.

X-Q. 21. Would you say that that photograph is an absolutely accurate representation of that window and the contents of it?

A. Yes, sir.

X-Q. 22. Did you take this from the outside of the store or the inside?

A. The outside.

X-Q. 23. And it was an absolutely bright day when you took it, was it?

A. It was cloudy, but the light was good.

X-Q. 24. It was a good light for taking a photograph as this shows?

A. Yes, sir.

X-Q. 25. Yes. Look at this package of Beech-Nut cigarettes, you see the name P. Lorillard Co. on it (indicating and handing to witness)?

A. Yes, sir.

X-Q. 26. And that is the black against the red here, isn't it?

A. Yes, sir.

X-Q. 27. Do you notice the name P. Lorillard Co. on the photographic representation of those packages?

A. No.

X-Q. 28. Does it show on any of those three Beech-Nut cigarettes signs, does it show on the photograph?

A. I don't notice that. I don't see it on there.

X-Q. 29. As a matter of fact, it is absolutely absent on those pictures, isn't it?

A. Yes, sir.

X-Q. 30. How far is this Pennell cigar store from this building here—how near is it?

A. Yes, one block from here.

X-Q. 31. Did you notice on those Beech-Nut signs in that window, on each of those packages or pictures on the cigarette packages, the words "P. Lorillard Co."?

A. No, sir.

X-Q. 31a. And then if the signs in the window show on those Beech-Nut panels or pictures the words "P. Lorillard Co." on the package, then you would say that was not an accurate representation of the window, would you not—of the signs in the window?

A. I was asked if it was a representation of the articles in the window.

X-Q. 32. You don't quite understand.

A. I understand what you say, and I know that a black photograph on red will photograph black.

X-Q. 33. But it would show that name on there, would it not?

A. It might not even if they were there. Red and black show black; a black photograph is black—

X-Q. 34. Then you are not certain, are you?

A. It depends on the depth of the red, and the sen-

sitiveness of the photographic plate whether or not the letters would be at all visible or not.

X-Q. 35. But to get back to my question, if the three Beech-Nut signs in the window, which I have marked in pencil for identification as A, B and C, showed on the picture of the Beech-Nut cigarette package the words "P. Lorillard Co.," as you look in the window, then this photograph would not be a true representation, would it?

A. You mean a representation, a true representation of all the colors?

X-Q. 36. Or the words on there?

A. In that particular case it might not be on account of the inability of the plate to photograph black against red.

X-Q. 37. If you looked in that window and saw on the signs the name "P. Lorillard Co.," on the bottom of those packages—cigarette packages of the signs, the same as is on the cigarette package itself—that is the name—then that photograph would not truly show that window and the packages and the reading matter of the signs, would it?

A. It would show the window and the packages.

X-Q. 38. But not the reading matter?

A. But not necessarily the reading matter; no, sir.

By Mr. Cavanagh: The photograph introduced by the plaintiff as Plaintiff's Exhibit No. 13 is now objected to on the ground that it does not accurately show the signs in the window, nor does it reproduce accurately the pictures or signs on the Beech-Nut cigarette.

And the deposition of this witness, in connection with this photograph is also objected to on the same grounds.

*Redirect Examination by Mr. Johnson.*

R-D. Q. 39. Is this photograph, marked Plaintiff's Exhibit No. 13, which you took of the Pennell cigar store window, in colors?

A. No, sir.

R-D. Q. 40. Do colors necessarily show in photographic prints, ordinary photographs?

A. Prints are shown in different degrees of grays and whites, different colors will photograph with different intensities from white to black.

R-D. Q. 41. Is this photograph a correct photographic representation of this show window and the display therein, when taken with the usual photographic materials?

A. Yes, sir.

By Mr. Cavanagh: Question objected to on the ground that the witness has testified that the name "P. Lorillard Co." does not show on the packages. Counsel for the P. Lorillard & Company understands that after this deposition has been taken an adjournment will be taken to the cigar store where the window in question is located and, therefore, counsel insists that an adjournment be taken over to the cigar store to determine this matter at once.

Adjournment thereupon taken to said Pennell's cigar store, 14 Patton Avenue, Asheville, N. C.

By Mr. Cavanagh: An adjournment was taken to the Pennell cigar store. The witness examined the show window of which Plaintiff's Exhibit No. 13, introduced this morning, was supposed to be a photograph. And the cross-examination of the witness Mr. H. W. Pelton by Mr. Cavanagh continued:

R-X Q. 42. Mr. Pelton, in my presence, you have just



sitiveness of the photographic plate whether or not the letters would be at all visible or not.

X-Q. 35. But to get back to my question, if the three Beech-Nut signs in the window, which I have marked in pencil for identification as A, B and C, showed on the picture of the Beech-Nut cigarette package the words "P. Lorillard Co.," as you look in the window, then this photograph would not be a true representation, would it?

A. You mean a representation, a true representation of all the colors?

X-Q. 36. Or the words on there?

A. In that particular case it might not be on account of the inability of the plate to photograph black against red.

X-Q. 37. If you looked in that window and saw on the signs the name "P. Lorillard Co.," on the bottom of those packages—cigarette packages of the signs, the same as is on the cigarette package itself—that is the name—then that photograph would not truly show that window and the packages and the reading matter of the signs, would it?

A. It would show the window and the packages.

X-Q. 38. But not the reading matter?

A. But not necessarily the reading matter; no, sir.

By Mr. Cavanagh: The photograph introduced by the plaintiff as Plaintiff's Exhibit No. 13 is now objected to on the ground that it does not accurately show the signs in the window, nor does it reproduce accurately the pictures or signs on the Beech-Nut cigarette.

And the deposition of this witness, in connection with this photograph is also objected to on the same grounds.

*Redirect Examination by Mr. Johnson.*

R-D. Q. 39. Is this photograph, marked Plaintiff's Exhibit No. 13, which you took of the Pennell cigar store window, in colors?

A. No, sir.

R-D. Q. 40. Do colors necessarily show in photographic prints, ordinary photographs?

A. Prints are shown in different degrees of grays and whites, different colors will photograph with different intensities from white to black.

R-D. Q. 41. Is this photograph a correct photographic representation of this show window and the display therein, when taken with the usual photographic materials?

A. Yes, sir.

By Mr. Cavanagh: Question objected to on the ground that the witness has testified that the name "P. Lorillard Co." does not show on the packages. Counsel for the P. Lorillard & Company understands that after this deposition has been taken an adjournment will be taken to the cigar store where the window in question is located and, therefore, counsel insists that an adjournment be taken over to the cigar store to determine this matter at once.

Adjournment thereupon taken to said Pennell's cigar store, 14 Patton Avenue, Asheville, N. C.

By Mr. Cavanagh: An adjournment was taken to the Pennell cigar store. The witness examined the show window of which Plaintiff's Exhibit No. 13, introduced this morning, was supposed to be a photograph. And the cross-examination of the witness Mr. H. W. Pelton by Mr. Cavanagh continued:

R-X Q. 42. Mr. Pelton, in my presence, you have just

examined or looked at the show window of the Pennell Cigar Store, and particularly the three Beech-Nut panels or signs. During this examination you noticed on each of the pictures or representations of the packages of cigarettes the words "P. Lorillard & Co." shown prominently on the package, did you not?

A. Yes, sir.

R-X Q. 43. And those words "P. Lorillard Co." do not appear upon the photograph of the packages which has been introduced in evidence as Exhibit 13 of plaintiff. Those words "P. Lorillard Co." do not show on this photograph?

A. Not so that we could see it.

R-X Q. 44. They do not show there at all, do they?

A. They do not show.

R-X Q. 45. So that so far as those particular Beech-Nut signs go this photograph is not a true representation of what you can see in the window when you stand on the sidewalk, is it?

A. This photograph is a representation—as far as you can get it.

R-X Q. 46. But it doesn't show the words "P. Lorillard Co."?

A. No, sir, it doesn't.

R-X Q. 47. So it is not really a true representation, is it?

A. As far as we can get it photographically, it is.

R-X Q. 48. Do you mean to say that when a picture of any object shows printing on it, and you take a photograph in which that printing is entirely absent, to the eye, that that is an accurate photograph?

A. I cannot answer that question by "yes" or "no." I would have to put in a few qualifying words, there are different colors, different degrees of intensity of lights and shades. A photograph reproduces in monotone, and different degrees of color.

R-X Q. 49. Well, to cut this whole matter short, the signs in the window show the name "P. Lorillard Co." prominently on these pictures of the package?

A. Yes.

R-X Q. 50. And they are not shown in the photograph?

A. No.

Mr. Cavanagh: The objection to the reception of the photograph in evidence because it is not an accurate representation and as not accurately showing the Beech-Nut cigarette signs in the window is repeated.

*Redirect Examination Continued by Mr. Johnson.*

R-D. Q. 51. Is there any question at all in your mind that this is not a correct photographic reproduction of that window and the display in it?

A. I consider it a correct photographic representation, with the ordinary photographic materials.

R-D. Q. 52. In order to bring out the colors of black and red, would you have to use other than the usual photographic materials?

A. Yes, sir. A red light is used in the dark room because plates are not sensitive to red. The ordinary photographic plate not being sensitive to the deeper shades of red and not sensitive to black, photographs of both are practically the same degree of intensity of monotone, so while the letters may be there, we cannot see them. So of the white clouds and the sky. The plates are sensitive to blue, very sensitive. Very sensitive to white. So if we get a picture on a blue background the whole thing will appear white. The clouds have been photographed on the blue sky, but we cannot see any differentiation between the two.

By Mr. Cavanagh: Further cross-examination.

R-X Q. 53. You could take a photograph of that window to show the words "P. Lorillard Co." and they would show up on that photograph the same as they do show in the window, couldn't you?

A. With the same materials to use?

R-X Q. 54. No, but you could take a photograph?

A. Yes.

R-X Q. 55. Will you do that for me?

A. I cannot do it on short notice.

R-X Q. 56. Will you take such photographs for me?

A. I would be glad to.

R-X Q. 57. They can be taken all right; it can be taken?

A. Yes, sir.

Deposition closed.

Signature waived.

W. C. PENNELL, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Johnson, deposed as follows:

By Mr. Johnson: Q. 1. Your name is W. C. Pennell?

A. Yes, sir.

Q. 2. Residence is 304 Hillside Street, Asheville, North Carolina?

A. Yes, sir.

Q. 3. Your age is forty years?

A. Yes, sir.

Q. 4. Your occupation a retail tobacco dealer and news agent, is that correct?

A. Yes, sir.

Q. 5. Under what name do you do business, and where?

A. Pennell's Cigar Store, 14 Patton Avenue, Asheville, North Carolina.

Q. 6. How long have you been in that business?

A. About thirty months.

Q. 7. Do you handle any of the Beech-Nut Packing Company's products, and name some of them that you handle?

A. Mints, gums, penny bars, caramels.

Q. 8. How long have you handled Beech-Nut products, Mr. Pennell?

A. Ever since I have been in business.

Q. 9. How have they sold with you?

A. Pretty well.

Q. 10. What does the Beech-Nut Packing Co. label stand for with you?

A. Well, nothing more than any other line of merchandise as far as that goes. It is merchandise that we have a demand for.

Q. 11. I show you a package of Beech-Nut cigarettes, in evidence in this case as Plaintiff's Exhibit No. 1; have you ever seen packages of these cigarettes before?

A. Yes, sir.

Q. 12. Do you sell them in your store?

A. Yes, sir.

Q. 13. How long have you handled them?

A. The best of my recollection it is about four or five months.

Q. 14. On what floor of the building is your store?

A. First floor.

Q. 15. Does your front store window face the sidewalk?

A. Yes, sir.

Q. 16. For what purpose do you use this show window?

A. Display purposes.

Q. 17. Are you displaying Beech-Nut products in your window at the present time?

A. No, sir. I am displaying Beech-Nut advertising matter, but there is no Beech-Nut products in there.

Q. 18. Have you a photograph of the display now in your window?

A. Yes, sir.

Q. 19. Who took this photograph?

A. Mr. Pelton.

Q. 20. What is his business?

A. Photographer.

Q. 21. Where?

A. Pack Square, Asheville, North Carolina.

Q. 22. When did Mr. Pelton take it?

A. The first one was made Saturday afternoon, and the other one yesterday afternoon, or yesterday sometime. I don't know whether it was in the afternoon or not.

Q. 23. On whose instructions did he take this picture?

A. Why, Mr. Atkinson's I presume.

Q. 24. Is this photograph, already in evidence in this case as Plaintiff's Exhibit No. 13, Pennell's Cigar Store Window Display—how long has this display, shown in this picture, been in that window?

A. Four or five days.

Q. 25. Who put it in?

A. I did.

Q. 26. Were the Beech-Nut hard candies and gum advertised in there longer than that?

A. They were in there previous to that.

Q. 27. About how long have you had the Beech-Nut Company's ads. in there?

A. About ten days.

Q. 28. Are these the Beech-Nut cigarette posters here in the center at the back (indicating)?

A. Yes, sir.

Q. 29. Who put them in there?

A. I did.

Q. 30. How did you happen to do it?

A. Simply to make a back ground to keep people out of the window.

Q. 31. When did you put them in there with reference to the time that the Beech-Nut Packing Company's display was put in there?

A. That was a day or two afterwards.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. You also show in your window besides these Beech-Nut cigarette signs and the Beech-Nut mints, you also display other articles and products of other concerns?

A. Strollers, Chesterfields, Fatima cigarettes.

X-Q. 2. Shaving cream?

A. Shaving cream, pipes, cigarette holders, magazines.

X-Q. 3. In other words, this is your general display window, isn't it?

A. Yes, sir.

X-Q. 4. And it faces one of the principal streets in the city?

A. Yes, sir.

X-Q. 5. You use that window to display any goods that you might handle?

A. Yes, sir.

X-Q. 6. You have heard of the P. Lorillard Company, haven't you?

A. Yes, sir.

X-Q. 7. You know that it is a large tobacco company, do you not?

A. Well, it is supposed to be.

X-Q. 8. Well, I know that you know the various brands



of good cigarettes, such as the Murads, and also the Climax tobacco?

A. Yes, sir.

X-Q. 9. And the Union Leader, and other well known brands of tobacco?

A. Yes, sir.

X-Q. 10. And the words "P. Lorillard Company" appear on this cigarette package, does it not?

A. Yes, sir.

X-Q. 11. And do you handle P. Lorillard scrap tobacco?

A. Yes, sir.

X-Q. 12. I wish to show you a package of this tobacco, which is in evidence in this case as the Plaintiff's Exhibit No. 3; is it a *fac-simile* representation of the scrap tobacco (handing to witness)?

A. Yes, sir.

X-Q. 13. That has the name "Lorillard's" on it?

A. Yes, sir.

X-Q. 14. And that is a P. Lorillard Company product?

A. It is supposed to be.

X-Q. 15. So far as you know, it is the P. Lorillard Company product?

A. Yes, sir.

X-Q. 16. How long have you been handling that tobacco?

A. Ever since I have been in business.

X-Q. 17. And that is a good selling tobacco?

A. Yes, sir.

Objection by Mr. Johnson to these questions in regard to P. Lorillard Company's scrap tobacco as being subject-matter outside the direct examination.

X-Q. 18. Now, in connection with this photograph. Would you mind stepping out to the window with me just a second. You have kindly stepped out in front to the

street, and in front of your show window, and have looked at the three Beech-Nut cigarette panels appearing thereon, to which I directed your attention, and you have also compared the same while standing at the window, with this photograph?

A. Yes, sir.

X-Q. 19. This photograph doesn't represent, truly represent those cigarette panels, does it?

A. No, it doesn't all show.

X-Q. 20. What is omitted there?

A. Well, the bottom of this panel, the letters that are there are not shown.

X-Q. 21. That is, the name P. Lorillard Co. doesn't show?

A. No, sir.

X-Q. 22. But it does appear on the signs in the window?

A. Yes, sir.

X-Q. 23. And the letters on those signs are rather large, are they not?

A. Fairly so.

X-Q. 24. You can see them standing in front of the window?

A. You can see them from the street.

X-Q. 25. So that this picture is not a true representation?

A. Well, it doesn't show it all.

X-Q. 26. I understand that in addition to tobacco you sell chewing gum, don't you?

A. Yes, sir.

X-Q. 27. If a customer comes in your store and wants to buy a package of Beech-Nut cigarettes or Beech-Nut scrap tobacco, you wouldn't hand him a package of Beech-Nut chewing gum, would you?

A. No, sir.

X-Q. 28. You would think he was crazy if he took it, wouldn't you?

A. Well, I wouldn't say that. If he says he wants a package of Beech-Nut. I say, what?

X-Q. 29. Suppose he asks you for Beech-Nut gum?

A. Suppose he asks me for Beech-Nut gum——

X-Q. 30. You wouldn't hand him Beech-Nut cigarettes?

A. No, sir, I would not, certainly.

X-Q. 31. Tobacco is an entirely different product from gum?

A. Yes, sir.

X-Q. 32. An entirely different class of goods?

A. Yes, sir.

X-Q. 33. And a man wouldn't go around swallowing a package of cigarettes for breakfast?

A. I don't know about that.

X-Q. 34. You wouldn't buy them and sell them——

A. Some men do lots of things.

X-Q. 35. You wouldn't do it, would you?

A. No, sir, I would not.

X-Q. 36. You never knew of the Beech-Nut Company selling any tobacco products at all, did you?

A. No, sir, not to my knowledge.

*Redirect Examination by Mr. Johnson.*

R-D. Q. 37. Are the Beech-Nut cigarette posters in the window, to which Mr. Cavanagh has called your attention, are they in colors?

A. I don't remember.

R-D. Q. 38. Are there colors on them?

A. I don't remember about that. I never paid enough attention to say whether they were or were not.

R-D. Q. 39. Step out and look at them again. Since

you gave your last answer have you looked at the posters in the window?

A. Yes, sir.

R-D. Q. 40. Are the Beech-Nut cigarette posters in colors?

A. About five colors on it.

R-D. Q. 41. Are the names P. Lorillard Company, to which Mr. Cavanagh has called your attention, in color?

A. Black, I think. I don't remember just which it is.

R-D. Q. 42. Black on what?

A. On the posters. Black on red.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 43. How long do you intend to let that exhibit remain?

A. Well, it was my intention to change it today, sir.

R-X Q. 44. So I understand, then, that you intend to redress your window today?

A. Yes, sir.

*Re-Redirect Examination by Mr. Johnson.*

R-D. Q. 45. In the ordinary course of business, how often do you change your window display?

A. Well, average about every four days.

R-D. Q. 46. If you change it in the near future, it will be in the regular ordinary course of your habit, wouldn't it?

A. Yes, sir.

R-D. Q. 47. Has your store front or the show window of which this is a photograph, your name on it anywhere?

A. No, sir, it has not.

R-D. Q. 48. In regard to these Beech-Nut posters—cigarette posters—at the back of this window display, where did you get those in order to put them in the window?

A. My recollection is I got them down at Barbee's and Clark's. I get all those posters and things down there.

R-D. Q. 49. With reference to the time that you were arranging the display which is in that window, and as shown in that photograph, when did you get the posters, the Beech-Nut cigarette posters?

A. Why, the Beech-Nut posters were brought in here by Mr. Hawkins. I had some Chesterfield cards sitting up there, and they were dirty, and I wanted to take them out.

R-D. Q. 50. Did you go down and get these Beech-Nut cigarette posters at that time, after you had rigged up the rest of the window?

A. Yes, sir.

*Re-Re-Cross-Examination by Mr. Cavanagh.*

R-X Q. 51. How long have you been buying and selling the Beech-Nut cigarettes?

A. I have been buying and selling the Beech-Nut cigarettes before they were ever put on the market here. I bought them from dealers out of town.

R-X Q. 52. And you are still selling them?

A. Yes, sir.

R-X Q. 53. And you know they are Lorillard's cigarettes?

A. Sure. Yes, sir, I knew it all the time.

Deposition closed.

Signature waived.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,  
Plaintiff,

*vs.*

P. Lorillard Company,  
*Defendant.*

In Equity, No. 3056.

*State of North Carolina, County of Buncombe, ss.*

I, Garland A. Thomasson, a Notary Public within and for the state and county above written, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of H. W. Pelton and W. C. Pennell, were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before me at Asheville, Buncombe County, North Carolina, beginning January 23, 1922; that each of the foregoing witnesses was by me duly sworn; that the testimony of said witnesses was taken by short-hand by me and reduced to typewriting by me; that the defendant party hereto was represented by R. B. Cavanagh at the taking of such testimony; that the testimony was taken in Asheville, Buncombe County, North Carolina, beginning at 10:15 A. M., and ending at 11 o'clock A. M., January 23, 1922; that the signature of each of the witnesses was waived by counsel, as indicated on the depositions.

I am not connected by blood or marriage to either of the parties hereto, or interested either directly or indirectly in the matter in controversy.

I also certify that I have been paid my fee as Special Examiner and for copies taken in accordance with the attached bill, amounting to \$32.95.

In witness whereof I have hereunto set my hand and  
notarial scal, this the 26th day of January, 1922.

GARLAND A. THOMASSON,  
Notary Public.

My commission expires April 19, 1923.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity, No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,		
<i>Defendant.</i>		

Depositions taken in behalf of plaintiff, before W. M. Walters, a Notary Public, acting as Special Examiner by consent of counsel, pursuant to notice and by agreement of counsel, at the W. T. Hill grocery store, 10 Mason street, West Greenville, S. C., beginning Tuesday, January 24th, 1922, at 2:25 o'clock P. M.

Present: H. McClure Johnson, Esq., of Messrs. Of-field, Poole, Hinton & Scott, for Beech-Nut Packing Company; Richard B. Cavanagh, Esq., of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

WILLIAM T. HILL, a witness produced on behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Johnson, deposes as follows:

*Direct Examination by Mr. Johnson.*

Q. 1. Your name is William T. Hill?

A. Yes, sir.

Q. 2. Your residence is 8 Traction Street, West Greenville?

A. Yes, sir.

Q. 3. Your age is 59 years?

A. Yes, sir.

Q. 4. Your occupation is proprietor of grocery store and meat market?

A. Yes, sir.

Q. 5. Under what name do you do business, and where?

A. W. T. Hill, Mason street, No. 10, West Greenville, S. C.

Q. 6. How long have you been in the grocery business?

A. About twenty-five years.

Q. 7. How long where you are now?

A. A year and a half.

Q. 8. Have you handled Beech-Nut Packing Company products?

A. Yes, sir.

Q. 9. Will you name some, please, which you have handled?

A. Well, I handle the Beech-Nut chewing gum, Beech-Nut peanut butter, and some other things that I handle, such as pork and beans and some other things I might not mention just now, but I have handled all of the goods pretty well.

Q. 10. How have they sold for you?

A. Fine; been good sale.

Q. 11. What has been your experience with people wanting them?

A. They come in to buy especially gum and that peanut butter, and if I don't have it they would go somewhere else, and said that's what they wanted, and so they go somewhere else; I reckon they want it.

Q. 12. What does the Beech-Nut label stand for to you?

A. Quality.

Q. 13. Do you sell tobacco and cigarettes in your store?

A. Yes, sir.

Q. 14. Alongside of your groceries?

A. Yes, sir.

Q. 15. Is it a common thing in your part of the country



for tobacco and cigarettes to be sold alongside of groceries?

A. Yes, sir.

Q. 16. I show you a package of Beech-Nut cigarettes, now in evidence in this case as Plaintiff's Exhibit No. 1; and a package of Beech-Nut scrap tobacco, now in evidence in this case as Plaintiff's Exhibit No. 3. When did you first hear of this tobacco and these cigarettes?

A. Why, a special man came around here sometime last fall, I think about the last or first of November, or first of September, and he offered that Beech-Nut tobacco for sale.

Q. 17. What month was that?

A. First of November, as near as I can recollect.

Q. 18. What did you say to him?

A. Well, I just have to commence sort of in my own way. You know we have men to come in here every day to sell something. As nigh as I recollect, I was by myself when he came in here. He asked me about the tobacco, and I had never heard tell of it. I told him I would not buy none now, but probably later on. I talked on and explained to him I didn't like buying new things. He went on then to ask me about how the Beech-Nut stuff sold, such as peanut butter and gum, and so on, and I told him it was a fine seller. "Well," he said, "this tobacco will make you just such a seller as Beech-Nut." I turned around to him and said, "The Beech-Nut Company putting out tobacco?" He talked on and I don't know I got any direct answer. Don't think I did.

Q. 19. What was the effect on you of what he did and said at that time?

A. Well, I just put it up that they had put out tobacco.

Q. 20. Who did you think put it out?

A. The Beech-Nut Company, that's who I thought.

Q. 21. When did you find out it was not made by the Beech-Nut Packing Company?

A. Later on someone came and asked me about the man coming here trying to sell Beech-Nut tobacco and that was the first I knew of it. I reckon it was around the latter part or the first of December they come in. That was the first I heard anything about it being wrong.

Q. 22. Are you familiar with the Beech-Nut Packing Company labels?

A. Yes, sir.

Q. 23. When you look at the Beech-Nut Packing Company labels, do they look like that?

A. Yes, sir, very much.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. Did this gentleman that tried to sell you tobacco tell you what concern he represented?

A. No.

X-Q. 2. He didn't say he represented the Beech-Nut Packing Company?

A. No, sir, I don't think he did.

X-Q. 3. And he didn't say that he was selling the tobacco for the Beech-Nut Packing Company?

A. No, sir, I don't think so.

X-Q. 4. Did you buy any tobacco from him?

A. No, sir.

X-Q. 5. Have you ever had in stock or bought or sold tobacco like this package of Beech-Nut cigarettes, Plaintiff's Exhibit No. 1?

A. No, sir.

X-Q. 6. Have you ever had in stock or bought or sold tobacco like this package of Beech-Nut scrap tobacco, Plaintiff's Exhibit No. 3?

A. No, sir.

X-Q. 7. So you have never had occasion to buy any

of this tobacco or these cigarettes, or kept them in stock?

A. No, sir; I had a chance to buy them, though.

X-Q. 8. So that you have never bought any of this tobacco or any of these Beech-Nut cigarettes under the impression of getting them from the Beech-Nut Packing Company?

A. No, sir, never bought any at all.

X-Q. 9. Now, this party that came in here said this tobacco would make as good a seller as the Beech-Nut line of goods; food products and chewing gum?

A. That's right.

X-Q. 10. Now, if I were to tell you that in 1919 the manufacturer of this scrap tobacco sold fourteen millions of dollars worth of it, or over two millions of dollars over the whole business of the Beech-Nut Packing Company, you would say I told the truth in saying it was a good seller?

A. Yes, sir, I believe I would.

X-Q. 11. Now, you notice the name "Lorillard" is on there, do you not?

A. Yes, sir.

X-Q. 12. Did you ever hear of the P. Lorillard Tobacco Company?

A. I don't know, I think——

X-Q. 13. You notice the name of the P. Lorillard Company on the cigarettes?

A. Yes, sir.

X-Q. 14. You don't find the name of the Beech-Nut Packing Company anywhere on these packages?

A. No, sir.

X-Q. 15. But you do find it on the peanut butter and other products?

A. Yes, sir.

X-Q. 16. Now, you speak of the label of the packages looking like the label of the Beech-Nut Packing Company

on the food products. I am referring to the tobacco and cigarette labels and food labels. Did you ever see a package of any goods of the Beech-Nut Packing Company you sold that had those red, radiating lines, like a sunbeam?

A. No, sir, I never did.

X-Q. 17. You never saw anything the Beech-Nut Packing Company put out like these red lines, did you?

A. Well, I never saw anything put out by that company with those red lines.

X-Q. 18. You never saw any package of the Beech-Nut Packing Company that looked like scrap tobacco?

A. No, sir.

X-Q. 19. Now, a cigarette package has an appearance or individuality all of its own, doesn't it?

A. Yes, sir.

X-Q. 20. You can tell cigarette packages as far as you can see?

A. Yes, sir.

X-Q. 21. You never knew anything put up by the Beech-Nut Packing Company like these cigarettes?

A. No, sir.

X-Q. 22. As I understand, in keeping this store or establishment here, you sell fresh meats, canned goods, tobacco, food products, general merchandise line, brooms, and the like; and you also sell candies and chewing gum, so naturally you are an experienced man in your grocery line?

A. Yes, sir.

X-Q. 23. Now, if a man came into this store and asked you for a package of Beech-Nut Chewing gum, would you hand him out a package of Beech-Nut cigarettes for chewing gum?

A. No, sir.

X-Q. 24. Neither would you hand him a package of this Beech-Nut scrap tobacco when he wanted chewing gum or peanut butter, would you?

A. No, sir.

X-Q. 25. So you think a man who would take cigarettes or tobacco when he wanted chewing gum or peanut butter would be crazy?

A. Why yes, we have a Scripture like that; and I would think that I was crazy, too.

X-Q. 26. That's because they are entirely different classes of goods?

A. Yes, sir.

X-Q. 27. They are known in your business as entirely different commodities?

A. Yes, sir.

X-Q. 28. No man who's got one ounce of wits left would ever take food products for tobacco products?

A. No, sir.

Deposition closed.

Signature waived.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity, No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,	}	
<i>Defendant.</i>		

Deposition taken in behalf of plaintiff, before W. M. Walters, a notary public, acting as Special Examiner by consent of counsel, pursuant to notice and by agreement of counsel, at the Imperial Hotel, West Washington Street, Greenville, S. C., Tuesday, January 24th, 1922.

Present: H. McClure Johnson, Esq., of Messrs. Of-field, Poole, Hinton & Scott, for Beech-Nut Packing Company; Richard B. Cavanagh, Esq., of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

WYATT P. JENNINGS, a witness produced on behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Johnson, deposes as follows:

*Direct Examination by Mr. Johnson.*

Q. 1. Your name is Wyatt P. Jennings?

A. Yes, sir.

Q. 2. Your residence is No. 333 Richardson Street, Greenville, S. C.?

A. Yes, sir.

Q. 3. Your age is twenty-two years next May?

A. Yes, sir.

Q. 4. Your occupation is traveling salesman?

A. Yes, sir.

Q. 5. By whom are you employed?

A. By the Beech-Nut Packing Company.

Q. 6. How long have you been employed by them?

A. Two years the first of next May.

Q. 7. In what capacity?

A. Salesman.

Q. 8. What do you sell for them?

A. Full line of Beech-Nut Packing Co. products.

Q. 9. What is your territory?

A. Fourteen counties in what is known as the "Piedmont" section of South Carolina.

Q. 10. To what class of trade do you sell Beech-Nut Packing Co. products?

A. General stores, cigar stores in large cities, and a great many of the general stores and smaller stores.

Q. 11. Are those retail stores?

A. Yes, sir; retail stores.

Q. 12. Is it common in your territory for the general stores and grocery stores to handle tobacco and cigarettes alongside of the groceries?

A. Yes, sir.

Q. 13. I show you a package of Beech-Nut cigarettes, now in evidence in this case as Plaintiff's Exhibit No. 1; and a package of Beech-Nut scrap tobacco, now in evidence in this case as Plaintiff's Exhibit No. 3. Have you ever seen packages of these cigarettes and tobacco before?

A. Yes, sir.

Q. 14. Have you ever seen them displayed for sale alongside the Beech-Nut Packing Company's goods or in the same room?

A. Yes, sir.

Q. 15. Have you seen this in a good many instances?

A. Yes, sir.

Q. 16. When did you first see these Beech-Nut cigarettes offered for sale in this territory?

A. Along about the first of October, 1921.

Q. 17. Have you since then seen them on sale generally through your territory?

A. Yes, sir.

Q. 18. Have you seen them displayed in windows of stores and the like?

A. Yes, sir.

Q. 19. Have you seen advertising and posters of these cigarettes?

A. Yes, sir.

Q. 20. Have you, in the course of your traveling about from place to place for the Beech-Nut Packing Company, heard remarks, comments or inquiries about these cigarettes?

A. Yes, sir.

Q. 21. Please state the nature of these remarks, comments or inquiries.

A. I walk into a man's store and the first thing they say is: "How long have you been putting them out—the Beech-Nut cigarette?" They ask you how they are selling; want to know if they are as good as the other products, gum and candies. Causes lots of confusion. Good many around; they ask if it is as good as other products and say that if it is as good as others, it is good.

Q. 22. Can you give a conservative estimate as to the number of times you have heard inquiries, comments or remarks of that nature since you first heard of these cigarettes?

A. Five hundred times.

Q. 23. Is that a conservative estimate?

A. Yes, sir.

Q. 24. Can you describe any instances of these inquiries such as you have just mentioned?

A. Yes, sir.



Q. 25. Please give several such instances; only cases where you remember the name of the speaker, the place, and what was said.

A. Todd Drug Company, Spartanburg, S. C.; Dr. Todd, proprietor. I was calling on Dr. Todd one morning along in November, somewhere in November. The question of Beech-Nut cigarette was brought up; he wanted to know how it was selling; said something about the label looking so much alike; lots of people thought it was the same thing as the Beech-Nut Packing Company. Said if it was as good as other products, it would sell good. He was under the impression himself that it was made by the Beech-Nut Packing Company. I corrected him and told him it was made by other people.

Q. 26. Can you describe another instance?

A. Webb-Cason Drug Store, Anderson, S. C.; Dr. Cason is buyer. One morning in October he mentioned something about the Beech-Nut cigarette; had noticed where it was put out; it looked like it was making a wonderful seller; had lots of calls for it, and with the quality and merit of the Beech-Nut Packing Company's other products, he said that the Beech-Nut cigarette would sell good. I corrected him and told him it was made by other people; that we did not put it out.

Q. 27. Can you name another instance?

A. Sprott Cigar Store, Spartanburg, S. C.; Mr. Sprott, proprietor. Walked in one morning in November. Mr. Sprott, the first thing he asked me: "Jennings, I want to buy some Beech-Nut cigarettes; lots of people have called for them and I want to know if it is as good as the gum and candies, as I have lots of calls for them. I want to know where I can get them." He said he thought they would go good. I corrected him and told him that this cigarette was not made by the Beech-Nut Packing Company.

Q. 28. Can you name another instance?

A. J. W. Hill, West Greenville, S. C., Grocery. In October, Mr. Hill said—he mentioned the Beech-Nut cigarette. He said he wanted to handle some of them if he was sure the quality was as good in the cigarette as it was in the Beech-Nut gum and other products, it would make him a wonderful seller. I corrected him that we did not put it out.

Q. 29. Do you have similar inquiries, remarks and comments in regard to the Beech-Nut scrap tobacco?

A. Not so much as the cigarette.

Q. 30. Have you experienced some such instances?

A. Not the same cases the tobacco as the Beech-Nut cigarette.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. Did one person ever ask you if the Beech-Nut scrap tobacco was made by the Beech-Nut Packing Company?

A. I can't remember all of them now; several cases that they have asked.

X-Q. 2. Just give me the names of the people.

A. Waldrop & Turner, Greenville, S. C.

X-Q. 3. What's their address?

A. Coffee street.

X-Q. 4. What line of business?

A. Grocery.

X-Q. 5. Do they handle the Beech-Nut scrap tobacco?

A. Yes, sir.

X-Q. 6. Do you know how long they have been handling it?

A. No, sir.

X-Q. 7. When did they ask you?

A. Several months ago.

X-Q. 8. The latter part of 1921?

A. Yes, sir.

X-Q. 9. I understand you to say that you are a salesman for the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 10. How long have you had the South Carolina territory?

A. Two years this coming May.

X-Q. 11. Ever since you have been in this territory you have seen this Beech-Nut scrap tobacco around?

A. I don't know; I don't remember that far back.

X-Q. 12. But you do remember you saw it for many months before that party made that inquiry?

A. I cannot say that.

X-Q. 13. This Beech-Nut tobacco is a large seller in tobacco stores and grocery stores. Do you mean to say you have been calling around on the trade during those two years and did not see that?

A. I do say I have seen the tobacco, but this has been about a year.

X-Q. 14. So you have seen it about a year on the market?

A. Yes, sir.

X-Q. 15. Now, you mentioned in your direct examination the names of several people that asked you about the cigarettes and whether they were made by the Beech-Nut Packing Company. You do not know of your own knowledge whether these people ever took the trouble to examine those cigarettes and see whose name was on there?

A. I cannot answer that. I was going by what they say.

X-Q. 16. You don't know whether they ever took the trouble?

A. They have gone to the trouble.

X-Q. 17. You know they have looked on the package?

A. Yes, sir.

X-Q. 18. The Beech-Nut Packing Company's name does not appear on that?

A. No, sir.

X-Q. 19. The name Lorillard does appear on that scrap tobacco?

A. Yes, sir.

X-Q. 20. Did you ever sell any tobacco products for the Beech-Nut Packing Company?

A. No, sir.

X-Q. 21. Did you ever know of the Beech-Nut Packing Company putting out any tobacco products, such as cigarettes and scrap tobacco?

A. No, I have not.

X-Q. 22. You receive, in the course of your business you receive lists containing the various items of goods the Beech-Nut Packing Company put out. That is, to make myself clear, whenever the Beech-Nut Packing Company puts out a new product, you are notified of that in some way, aren't you?

A. Yes, sir.

X-Q. 23. And it's added to your list?

A. Yes, sir.

X-Q. 24. You have practically a complete list, at some time or other, of all food products they handle, don't you?

A. But they are not all food products.

X-Q. 25. What is not a food product?

A. Gum.

X-Q. 26. Gum comes under the Pure Food Law, doesn't it?

A. Yes, sir.

X-Q. 27. And the Pure Food Law covers food products?

A. Yes, sir. But I would not call it a food product.

X-Q. 28. As a matter of fact, you don't know whether gum is a food product or not?

A. I would say, some people would not say so.

X-Q. 29. Would you call it a confection?

A. I would.

X-Q. 30. There is one thing certain; gum isn't tobacco.

A. No, sir.

X-Q. 31. They are distinct classes of goods?

A. Sure, they are different.

X-Q. 32. If you wanted to buy peanut butter or Beech-Nut gum you could not be confused in accepting scrap tobacco for it?

A. Well, in a case like that, at some time any man will call for a package of Beech-Nut and the merchant will throw out Beech-Nut tobacco.

X-Q. 33. If you asked the man for Beech-Nut chewing gum, could you be deceived into taking tobacco?

A. No, sir. If I called for it, I would want it.

X-Q. 34. You would know the difference?

A. Yes, sir. I know the difference between tobacco and gum.

X-Q. 35. You would know the difference right away, and would not be confused for a minute on it?

A. I would look at the name.

X-Q. 36. I am speaking of the two kinds of goods; you would not be confused a minute?

A. If I called for a certain piece of goods they are going to give it to me.

X-Q. 37. If they did offer tobacco and you wanted chewing gum, you would not take it?

A. I would study for a minute; I would be under the same impression.

X-Q. 38. I am not asking you about impressions. If you went in and wanted to buy a 5-cent package of Beech-Nut chewing gum and asked for gum, and he handed you either a package of cigarettes or Lorillard's scrap tobacco.

co, you would not take either one of these for the goods you wanted—the gum?

A. No.

X-Q. 39. Now, you are around in the grocery trade, are you not?

A. Yes, sir.

X-Q. 40. You notice the Star soap?

A. Yes, sir.

X-Q. 41. You know there is a Star ham?

A. Yes, sir.

X-Q. 42. You know there is a Star chewing tobacco?

A. I have heard of that. My idea is not to take up tobacco, because I never come in contact.

X-Q. 43. So you never had any interest in the tobacco line?

A. No, sir.

X-Q. 44. So you are not at all familiar with the tobacco line?

A. No, sir.

X-Q. 45. You don't know whether there is a Star tobacco?

A. No, sir.

X-Q. 46. You have heard of Liggett-Myers Tobacco Company?

A. Yes, sir.

X-Q. 47. You have never heard of their famous Star chewing tobacco?

A. No, sir.

X-Q. 48. You have heard of the Star ham and Star soap?

A. Yes, sir.

X-Q. 49. It comes by the name of "Armour's Star Ham"?

A. Yes, sir.

X-Q. 50. It's got "Armour's" on there, same as Lorillard's Beech-Nut tobacco?

A. Yes, sir.

X-Q. 51. You are pretty familiar with the Beech-Nut Packing Company's forms and shapes and dress of packages?

A. Yes, sir.

X-Q. 52. Did you ever know of the Beech-Nut Packing Company putting out a package resembling this scrap tobacco?

A. Looks very much like the label.

X-Q. 53. In other words, you have never known of the Beech-Nut Packing Company to put up a package of goods in its general shape resembling this package of Beech Nut scrap tobacco, and had red, radiating lines on it?

A. I have never noticed it very closely.

X-Q. 54. Did you ever know of the Beech-Nut Packing Company to put up anything like that at all?

A. No.

X-Q. 55. You never noticed that the Beech-Nut Packing Company put up anything in a package that had that red sunburst on it, did you?

A. No, I have not.

X-Q. 56. You can tell a cigarette package, so far as its shape and appearance goes, as far as you can see it, can't you?

A. Sure, you can tell it.

X-Q. 57. It's got an individuality and shape all of its own, hasn't it?

A. It's got a shape.

X-Q. 58. In other words, whether it is Beech-Nut cigarette, or whether it is Chesterfield cigarette, or Lucky Strike, or any other cigarette, you can tell them when you see them on the shelves; you can tell they are cigarettes?

A. Sure you can.

X-Q. 59. You never knew the Beech-Nut Packing Com-

pany to put out any package in the form or shape of a cigarette package?

A. No, sir.

X-Q. 60. Never heard of them doing that?

A. No, sir.

X-Q. 61. Now, when you told these parties, about whom you spoke—that if the Beech-Nut Packing Company did not put out these cigarettes and scrap tobacco, you said that you did not put it out, didn't you?

A. Yes, sir.

X-Q. 62. Who did you tell them put it out?

A. I didn't tell who put it out, but told them the Beech-Nut Packing Company didn't.

X-Q. 63. Do you know whether any of these men you spoke of bought any of it?

A. Sure, they were handling the stuff.

X-Q. 64. You were the regular salesman calling there in behalf of the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 65. You never knew of any Lorillard men selling food products?

A. No, sir.

X-Q. 66. Do you know who the Lorillard agent is in this district?

A. I met Mr. Dorr.

X-Q. 67. But you never ran into one of the Lorillard agents selling Beech-Nut tobacco in the stores; or cigarettes?

A. No, sir.

X-Q. 68. You never knew of any tobacco concern that manufactured food products, did you?

A. No, I haven't.

X-Q. 69. You never knew of a food packing concern that manufactured tobacco, did you?

A. No.

Deposition closed.

Signature waived.



UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity, No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,	}	
<i>Defendant.</i>		

CERTIFICATE.

*State of South Carolina, County of Greenville, ss.*

I, W. M. Walters, a Notary Public within and for the state and county aforesaid, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of William T. Hill and Wyatt P. Jennings were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before me, at West Greenville, S. C., and Greenville, S. C., beginning January 24th, 1922; that each of the foregoing witnesses were duly sworn; that the testimony of said witnesses was taken down in shorthand by me and thereafter reduced to typewriting by me; that the opposing party hereto was represented by Richard B. Cavanagh, Esq., at the taking of said testimony; that the testimony was taken in West Greenville, S. C., and Greenville, S. C., beginning at 2:25 o'clock, P. M., and ending at 4 o'clock P. M., on January 24th, 1922; that the signature of both witnesses was waived by counsel in the case, as indicated on the depositions.

I am not connected by blood or marriage with either of the parties hereto; or interested directly or indirectly in the matter in controversy.

I also certify that I have been paid my fees as Special

Examiner and for copies taken, in accordance with the attached bill, amounting to \$16.00.

In witness whereof, I hereto set my hand and seal this 26th day of January, A. D. 1922, at Greenville, S. C.

W. M. WALTERS,

Notary Public for South Carolina.

My commission is in force during the pleasure of the Governor.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,		
<i>Defendant.</i>		

DEPOSITION OF ROBERT L. BOWEN.

Deposition taken in behalf of plaintiff before J. W. Mansfield, Notary Public and Court Reporter for the Court of General Sessions, Seventh District of South Carolina, until his recent resignation to devote all of his time to the practice of law, acting as Special Examiner by consent of counsel, pursuant to notice and by agreement of counsel, at the residence of R. L. Bowen, No. 302 South Liberty Street, Spartanburg, South Carolina, beginning January 25th, 1922, at 11:40 o'clock A. M.

Present: H. McClure Johnson, of Offield, Poole, Hinton & Scott, attorneys for Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, attorneys for P. Lorillard & Company.

ROBERT L. BOWEN, a witness produced in behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn by me, in response to interrogatories propounded by Mr. Johnson, deposes as follows:

*Direct Examination by Mr. Johnson.*

Q. 1. Your name is R. L. Bowen; your residence No. 302 South Liberty Street, Spartanburg, South Carolina; your age, 56 years; your occupation, grocer; is that right?

A. Yes, sir.

Q. 2. Under what name were you doing business last fall, and where?

A. R. L. Bowen and Company, 325 South Liberty Street, Spartanburg, S. C. I am now out of business and expect to resume as soon as building is completed now being erected for that purpose.

Q. 3. How long did you engage in the grocery business at 325 South Liberty Street?

A. About two years.

Q. 4. Have you ever handled Beech-Nut Packing Company products?

A. Yes, sir.

Q. 5. How long?

A. Two years.

Q. 6. Did you handle them before you went into business here?

A. Handled them before—a year or so before.

Q. 7. Please name some of the Beech-Nut Packing Company products that you have handled.

A. Beech-Nut peanut butter, Beech-Nut catsup, Beech-Nut jelly, Beech-Nut chewing gum, Beech-Nut candy.

Q. 8. How have they sold for you?

A. Fine.

Q. 9. What does the Beech-Nut label stand for to you?

A. Quality.

Q. 10. How strong is the demand for Beech-Nut Packing Company products from your customers?

A. It is good. If we have not got it, they will go somewhere else and buy it. We can't substitute for it.

Q. 11. Did you keep a general grocery store up to the time you sold out?

A. Yes, sir.

Q. 12. As a part of your general grocery store business, did you keep tobacco and cigarettes?

7  
4  
3

A. Yes, sir.

Q. 13. Did you keep tobacco and cigarettes for sale alongside your groceries?

A. Yes, sir.

Q. 14. Is it a common thing in your part of the country for grocery stores to handle tobacco and cigarettes?

A. Yes, sir.

Q. 15. I show you a package of Beech-Nut cigarettes now in evidence in this case as Plaintiff's Exhibit No. 1; have you ever seen a package of these cigarettes before?

A. Yes, sir.

Q. 16. When did you ever see any of them?

A. The first part of November, 1921.

Q. 17. When you first saw them, who did you think put them out?

A. Beech-Nut Packing Company.

Q. 18. What made you think so?

A. Well, a man came in and held it up just like you, only not so far, not that far away, and I saw Beech-Nut on it and the style of their label.

Q. 19. What was the occasion when you first saw the Beech-Nut cigarettes?

A. I was in the store and a gentleman came in—I was busy at the time, and he walked around. He kept waiting and finally I got a chance to speak to him. He said, "I see you handle Beech-Nut peanut butter, and I want to sell you some Beech-Nut cigarettes."

Q. 20. Then, what occurred between you and him?

A. He tried to sell me some, and I told him that I did not want to put in a new line, I was handling Chesterfields. He could not sell me, and he started to pack up and go away, and I said, "It's funny that the Beech-Nut Packing Company is putting up cigarettes." He said, "Yes," and went on out the door.

Q. 21. Did he have any Beech-Nut cigarettes with him?

A. Yes, sir.

Q. 22. What effect did he have on you? What impression did he leave?

A. He left the impression that the cigarettes were put up by the Beech-Nut Packing Company.

Q. 23. How long did you think that?

A. Until the last of November.

Q. 24. What happened at that time?

A. Mr. Jennings and Mr. Atkinson come in and told me different.

Q. 25. Who are they?

A. They were Beech-Nut Packing Company representatives.

Q. 26. Are you familiar with Beech-Nut Packing Company labels?

A. Yes, sir.

Q. 27. Would you take this label on Beech-Nut cigarettes for one of their labels?

A. Yes, sir.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 1. Mr. Bowen, how long have you been in the grocery business, all told?

A. In this town?

X-Q. 2. Any place.

A. Something like nine years—more than that—ten or eleven years.

X-Q. 3. How long have you been selling tobacco—all during that time?

A. Yes, sir.

X-Q. 4. You have heard of P. Lorillard & Company, the tobacco people, of course?

A. Yes, sir, I have heard of them.

X-Q. 5. You have sold their chewing tobacco in your stores?

A. Yes, sir.

X-Q. 6. Did you ever sell any chewing tobacco like this Beech-Nut scrap (showing witness package of same)?

A. No, sir.

X-Q. 7. I understood that at the time this party tried to sell you some Beech-Nut cigarettes you were engaged in the general grocery business here in Spartanburg?

A. Yes, sir.

X-Q. 8. In that general grocery store I suppose you sold not only canned goods and tobacco, but a great many miscellaneous articles, like brooms and potatoes and meats and one thing another, did you not?

A. Yes, sir.

X-Q. 9. A grocery store is liable to have in it for sale a great many goods not related, that is, a broom is not food, is it?

A. People don't eat brooms.

X-Q. 10. So you sell a great many articles not related to each other?

A. A few—a broom is one.

X-Q. 11. Tobacco is not a food product, is it?

A. No, sir.

X-Q. 12. Like a broom, that is not related to food, is it?

A. No, sir, I would not think so.

X-Q. 13. Now, then, this party who came into your store, he did not say he represented the Beech-Nut Packing Company, did he?

A. I don't know that he said it—just offered the Beech-Nut cigarettes.

X-Q. 14. When was that?

A. That was last November—first of last November.

X-Q. 15. Did he say what his name was?

A. If he did, I don't remember it—I could not say.

X-Q. 16. You don't know whether he represented the Beech-Nut Packing Company or P. Lorillard & Company, for that matter, do you?

A. No, sir.

X-Q. 17. He showed you a package of the Beech-Nut cigarettes, did he not?

A. Yes, sir.

X-Q. 18. Did you really take the trouble to look at it?

A. Yes, sir. I don't think I took it in my hand, though.

X-Q. 19. The name "P. Lorillard Co." is on that package, if you look at it closely. If you take that package and take the trouble to look at it, you will see that the name is on it.

A. Yes, sir, it is on it.

X-Q. 20. You did not see and you don't see the Beech-Nut Packing Company's name on it?

A. No, sir, but one just glancing at it would think it was Beech-Nut Packing Company.

X-Q. 21. But if you look at it, you see the name "P. Lorillard Co."?

A. I am looking at it now.

X-Q. 22. And you see the name "P. Lorillard Co." through the paper there?

A. I see something black. You can't read it that distance.

X-Q. 23. From whom had you been in the practice of buying Beech-Nut goods?

A. Mr. Jennings.

X-Q. 24. Is he here?

A. Sitting here in this room.



X-Q. 25. How long have you been buying goods from Mr. Jennings?

A. Something like two years.

X-Q. 26. You always bought your Beech-Nut goods from Mr. Jennings?

A. Yes, sir.

X-Q. 27. You would naturally think it strange that another party should come in to sell you Beech-Nut goods?

A. Not necessarily.

X-Q. 28. The party who came in to sell you the cigarettes did not say he was the Beech-Nut Packing Company's representative?

A. He offered me Beech-Nut cigarettes.

X-Q. 29. He did not say he was from the Beech-Nut Packing Company?

A. I don't think he said he was from the Beech-Nut Packing Company. He said he saw I was handling Beech-Nut peanut butter, and he wanted to sell me some Beech-Nut cigarettes. He did not say he was from the Beech-Nut Packing Company—he made me think, though, that he was selling me cigarettes put up by them.

X-Q. 30. You did not buy any, did you?

A. I did not buy any from him, but he went off leaving me under that impression.

X-Q. 31. What else did this man have with him besides the cigarettes?

A. He did not show me anything else—when he went out of the store, I just made the remark that it was funny the Beech-Nut people were making cigarettes. He just said, "Yes." He did not explain to me they were made by a different concern. He left the impression on my mind that the Beech-Nut Packing Company were making the cigarettes. He wanted to sell me

Beech-Nut cigarettes, and speaking about the Beech-Nut butter made me think they were made by them.

X-Q. 32. He did not say the Beech-Nut Packing Company were making them?

A. I don't remember what he said about it, but he left the impression on me that the Beech-Nut Packing Company were making the cigarettes.

X-Q. 33. You say he did not show you any credentials or leave any card?

A. No, sir, he did not.

X-Q. 34. Have you ever seen him since?

A. No, sir.

X-Q. 35. Could you describe his appearance?

A. No, sir.

X-Q. 36. You don't know what company he was from at all?

A. No, sir.

X-Q. 37. I understood you to say you were familiar with the Beech-Nut Packing Company label?

A. Yes, sir.

X-Q. 38. Will you describe that label to me, please?

A. It is oval.

X-Q. 39. What kind of oval is it?

A. Oblong.

X-Q. 40. What color?

A. Different colors.

X-Q. 41. You say they have an oval label in different colors?

A. I think most of them are red.

X-Q. 42. Has their label got a picture of a beech-nut on it?

A. I don't remember.

X-Q. 43. Has that red band got any printing on it, do you know?

A. Yes, sir.

X-Q. 44. I show you a specimen label of mints, is that Beech-Nut Packing Company label?

A. Yes, sir. They are different sizes, you understand.

X-Q. 45. This package of cigarettes has not any label like—it is not the oval of the Beech-Nut brand?

A. It is not a red oval just like them.

X-Q. 46. The oval of the Beech-Nut cigarettes which I am showing you has not any printing on it like that on the Beech-Nut mint?

A. No, sir.

X-Q. 47. In this Beech-Nut cigarette label you have two crossed beech-nuts in gold and red, haven't you?

A. Yes, sir.

X-Q. 48. In that Beech-Nut mint label you have a single beech-nut on three green leaves in the center of it?

A. Yes, sir.

X-Q. 49. So those labels are not alike?

A. They are not just alike—they are similar.

X-Q. 50. In handling groceries you have sold lots of goods on which the label was oval, like Armour's Veribest, and other goods?

A. Yes, sir.

X-Q. 51. An oval label is a very common thing on canned goods and other goods, is it not?

A. Yes, sir, it is very common.

X-Q. 52. You never knew of the Beech-Nut Packing Company's putting out any cigarettes, did you?

A. No, sir.

X-Q. 53. You never knew of the Beech-Nut Packing Company's putting out a package of the same shape and general appearance of this cigarette package, did you?

A. No, sir.

X-Q. 54. A cigarette package has an appearance and individuality all its own, has it not?

A. Lots of other packages like it.

X-Q. 55. What is packed like it?

A. I have seen salts put up very much like it.

X-Q. 56. In a loose cup-wrapper like this?

A. You take little raisins, they are put up that way.

X-Q. 57. You would not say a package of raisins looked like this package of cigarettes with the package a different color and different shape and different size—you would not take a package of raisins for a package of cigarettes, would you, when you looked at the size of it and the squareness of it?

A. Probably not.

X-Q. 58. If a man came into your store and wanted to buy and asked you for a package of Beech-Nut cigarettes, would you hand him a package of Beech-Nut chewing gum in the place of the cigarettes?

A. No, sir, I would not.

X-Q. 59. That is, a package of cigarettes and a package of chewing gum are different articles?

A. Yes, sir.

X-Q. 60. You call it a different class of goods?

A. Yes, sir.

Deposition closed.

Signature waived.

Transcribed January 26th, 1922, by J. W. Mansfield personally.



In witness whereof I have hereunto set my hand and official seal this 26th day of January, 1922.

[SEAL.] J. W. MANSFIELD,  
Notary Public for South Carolina.

My commission expires at the will of His Excellency, the Governor of South Carolina.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity, No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,		
<i>Defendant.</i>		

Deposition taken on behalf of the plaintiff, before A. D. McFaddin, a Notary Public for the State of South Carolina, acting as Special Examiner by consent of counsel, pursuant to notice and by agreement of counsel at the Capital Cash and Carry Grocery, 827 Main street, Columbia, S. C., beginning Friday, January 27, 1922, at 10:20 o'clock A. M.

Present: H. McClure Johnson, Esq., of Offield, Poole, Hinton & Scott, for the Beech-Nut Packing Company; R. B. Cavanagh, Esq., of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard & Company.

JEFFERSON D. HAYDEN, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Johnson, deposes as follows:

By Mr. Johnson: Q. 1. Your name is Jefferson D. Hayden?

A. Yes, sir.

Q. 2. You reside at 2017 Sumter street, Columbia, S. C.; your age is 31 years; and your occupation is that of grocer; is that correct?

A. Yes, sir.

Q. 3. Under what name do you do business?

A. Capital Cash and Carry Grocery, 827 Main street.

Q. 4. In what town?

A. Columbia, S. C.

Q. 5. How long have you been doing business there?

A. Since July, 1921.

Q. 6. Have you handled Beech-Nut Packing Company's products?

A. I have.

Q. 7. How long have you handled them?

A. Since I first opened up.

Q. 8. Please name some of the Beech-Nut Packing Company's products that you have handled.

A. Beech-Nut gum, pork and beans, Beech-Nut peanut butter. Those are three that I have handled.

Q. 9. How have they sold for you?

A. One hundred per cent.

Q. 10. What does Beech-Nut Company's label mean to you?

A. It means a great deal—that is, in the line of groceries—quality.

Q. 11. Quality?

A. Yes, sir.

Q. 12. Do you keep a general line of groceries?

A. I do.

Q. 13. Do you sell tobacco and cigarettes along with your groceries?

A. Yes, sir.

Q. 14. Is that common in your part of the country, to sell tobacco and cigarettes along side of groceries in the same store?

A. It is.

Q. 15. I show you a package of Beech-Nut scrap tobacco, now in evidence in this case as Plaintiff's Exhibit No. 3, and a package of Beech-Nut cigarettes, already in evidence in this case as Plaintiff's Exhibit No. 1. Have you this tobacco and these cigarettes on your shelves for sale?

A. Yes, sir.



Q. 16. Do you display them in the display section of your store, along with the other tobacco and cigarettes that you handle?

A. I do.

Q. 17. Whereabouts in your store with reference to the tobacco and cigarette section do you display for sale the Beech-Nut chewing gum?

A. In the same section, on the bottom shelf, just below the tobacco.

Q. 18. How many shelves is that from the tobacco?

A. One shelf below.

Q. 19. Where do you display for sale some of your other Beech-Nut products?

A. On the same shelf, but about two sections, I should say, to the west on the same shelf—two sections over.

Q. 20. About how many feet?

A. About 8 feet, maybe only 6 or 7 feet.

Q. 21. What is it that you keep there?

A. Beech-Nut peanut butter.

Q. 22. Did you make a practice of keeping Beech-Nut peanut butter in this place?

A. Ever since I opened up—on the same shelf.

Q. 23. When was the first time you ever saw a package of this Beech-Nut tobacco—scrap tobacco?

A. October 18, 1921, when a salesman came in to see me and sold me, and sold me.

Q. 24. When you first saw the package who did you think was putting it out?

A. The Beech-Nut people.

Q. 25. What Beech-Nut people?

A. The same people who were putting out the other Beech-Nut products.

Q. 26. Why did you think that?

A. From the appearance of the package, all looked the same, the label and the name Beech-Nut.

Q. 27. Who was the man who come into your store, the salesman, that day, October 18, 1921?

A. E. L. Larson.

Q. 28. What took place between you and Mr. Larson when he came into your store, October 18, 1921?

A. He came in and introduced himself as Mr. Larson, selling Beech-Nut tobacco, and from the appearance of the package it looked the same as the other Beech-Nut products, and he told me the Beech-Nut was a good seller, and I told him I had been selling the other products all along, and I thought it would be a good seller, and I would try a small quantity of it, and he said, "Well, who would you like for it to come through," and I told him it did not make any difference to me—Byrd-Johnson would do. They were jobbers. I told him he could send me a small quantity. He said he would put in a dozen, and I told him all right. He had a little case with him full of tobacco, full of these packages, and he says, I can leave these packages with you. I told him all right. So I took an order for a dozen packages, and in the meantime I asked him how much it would amount to. He said less than a dollar, so I took an order for a dozen and paid him. He said it would amount to 96 cents, with 2 per cent. discount. I said, "Well, you can just mark the bill paid." In the meantime he gave me this receipt here, marked 1 doz. packages, 10-cent size, which amount to 96 cents, 2 per cent. discount comes to 94 cents, paid to E. L. Larson. I gave him the cash over the counter for it.

Q. 29. What was the effect on you of what Mr. Larson did and said at that time?

A. He left me under the impression that it was the same house that sold the other Beech-Nut products, and that it was a good seller, that it would sell as the other products had been selling, and I understood the tobacco would be good, too.

Q. 30. Who did you think was putting it out as a result of what he said?

A. The same people who were putting out the other Beech-Nut products.

Q. 31. How long did the conversation with Mr. Larson last?

A. Very short. I suppose fifteen or twenty minutes. He was not in there very long, a very short time.

Q. 32. You say he gave you this receipt for your order and your money?

A. He did.

Receipt signed E. L. Larson, identified by this witness, offered in evidence, and marked Plaintiff's Exhibit No. 14.

Q. 33. Please look at this receipt and read the printed name at the top.

A. "P. Lorillard." A part of it is scratched out.

Q. 34. Torn out?

A. Yes, sir. "P. Lorillard" is all I see, looks like "Incorporated" on the end.

Q. 35. Torn out?

A. Torn out (resuming the reading), "119 West 40th Street, New York."

Q. 36. What is the date on it?

A. "October 18, 1921."

Q. 37. Is there any jobber named?

A. Byrd-Johnson.

Q. 38. What address?

A. "Columbia, S. C."

Q. 39. Any shipping instructions?

A. Under name, "Cash and Carry Groceries, shipping point 827 Main. quantity 1 doz., brand Beech-Nut. size, ten cents, price, 96" cents, discount 2 cents, net, "94" cents. Marked "Paid" by "E. L. Larson."

Q. 40. Is that his signature?

A. Yes, sir.

Q. 41. Is there any other indication of the salesman on that order blank?

A. "Order taken by Salesman E. L. Larson," stamped with rubber stamp, I suppose it is.

Q. 42. Did you know what P. Lorillard Company was, whose name was at the top?

A. I did not.

Q. 43. Did that mean anything to you?

A. No, sir.

Q. 44. You did not notice it at the time?

A. I did not.

Q. 45. Was shipment made through the jobbers?

A. No, sir.

Q. 46. How was it delivered to you?

A. Over the counter.

Q. 47. Did you buy that dozen packages of tobacco—of Beech-Nut scrap, believing that you were dealing with the same people that were putting out Beech-Nut butter?

A. I did.

Q. 48. Did you sell any of it to your customers thinking it was put up by the same company that put up Beech-Nut butter?

A. I did.

Q. 49. Can you tell us what you said to some of them?

A. I says, I have a new Beech-Nut product on the market, and it should be a good seller, that it was Beech-Nut, and it ought to be all right. Beech-Nut products were good sellers, and it should be a good product if it were as good as the others were.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 50. What is your name?

A. Jefferson D. Hayden.

X-Q. 51. Mr. Hayden, you were speaking in your direct examination of having your Beech-Nut chewing gum and other Beech-Nut products near the tobacco shelves.

A. Yes, sir.

X-Q. 52. I notice that you sell brooms in this store. don't you?

A. Yes, sir.

X-Q. 53. And your brooms are up against your sweet potatoes?

A. Yes, sir.

X-Q. 54. And you have got a bunch of bannanas up against your meat and milk chest?

A. Yes, sir.

X-Q. 55. It is simply a question of convenient arrangement?

A. Yes, sir, just like an ordinary line.

X-Q. 56. I notice you have quite a nice stock tobacco products on sale here. I see you sell Climax plug tobacco.

A. Yes, sir.

X-Q. 57. How long have you been selling Cimax plug?

A. I suppose ever since I opened up. I buy in small quantities, a box at a time.

X-Q. 58. How long have you been selling it—in years?

A. I have not been opened up only since July.

X-Q. 59. And you have been selling Climax since July?

A. Yes, sir.

X-Q. 60. I notice you also have Old Virginia cheroots for sale.

A. Yes, sir.

X-Q. 61. How long have you been selling Old Virginia cheroots?

A. Ever since we opened up.

X-Q. 62. Did you or not ever hear about Lorillard?

A. What name is that?

X-Q. 63. Whose name is on Old Virginia cheroots?

A. P. Lorillard Company.

X-Q. 64. What name on the scrap tobacco?

A. P. Lorillard Company.

X-Q. 65. What name on the Climax chewing tobacco?

A. P. Lorillard Company.

X-Q. 66. I notice you also sell Beech-Nut cigarettes.

A. Yes, sir.

X-Q. 67. Whose name is on that Beech-Nut package (showing package)?

A. Lorillard Company, looks like.

X-Q. 68. P. Lorillard Company?

A. Yes, sir.

X-Q. 69. And this little yellow tag or slip that is over the carton of cigarettes, whose name appears on that?

A. Lorillard.

X-Q. 70. So all of those products are Lorillard products?

A. Yes, sir.

X-Q. 71. You don't find the name of Beech-Nut Packing Company on any of this tobacco, do you?

A. No, sir, I don't see it.

X-Q. 72. And this receipt you have produced in evidence, that receipt bears, or did bear, but torn, the name P. Lorillard Company, 119 West 40th street, New York, did it not?

A. Yes, sir.

X-Q. 73. That receipt you say was given by a salesman, Mr. Larson?

A. Yes, sir.

X-Q. 74. And since you received that first dozen packages of Lorillard scrap tobacco you have continued to sell that tobacco?

A. I am selling it now, yes, sir.

X-Q. 75. It is a good selling scrap tobacco, too?

A. Yes, sir.

X-Q. 76. So you have taken repeated orders for that tobacco right straight along?

A. Yes, sir.

X-Q. 77. You haven't the slightest objection to selling that tobacco, whether it was made by Lorillard or anybody else, as long as it sells?

A. I have no objection to selling it, no.

X-Q. 78. From whom had you been in the habit of buying your Beech-Nut products?

A. Food products from Thomas & Howard.

X-Q. 79. Does a Beech-Nut Packing Co. salesman ever call in here?

A. He has been in occasionally.

X-Q. 80. Have you given him orders?

A. I don't know. I think I gave him an order on one occasion, may be a couple of occasions, for some beans, and may be a couple of packages of chewing gum. I sell more chewing gum than anything else. I bought chewing gum from Thomas & Howard.

X-Q. 81. From the jobbers?

A. Yes, sir.

X-Q. 82. You knew the Beech-Nut Packing Company's salesman that used to come in here on his regular route?

A. Just like all the rest who come in regularly.

X-Q. 83. That was not Mr. Larson?

A. No, sir.

X-Q. 84. Larson was a tobacco man?

A. So he said.

X-Q. 85. When he came in here Larson did not tell you that the tobacco was made by the Beech-Nut Packing Company, did he?

A. He did not tell me who made it.

X-Q. 86. But he gave you a receipt of P. Lorillard Company?

A. That is the receipt he gave me.

X-Q. 87. That receipt has no connection whatever with the Beech-Nut Packing Company?

A. It has not, so far as the name on it.

X-Q. 88. As an ordinary careful man, familiar with business, as you are, when that receipt was given to you, if you looked at it you would have seen P. Lorillard, and known it was a P. Lorillard receipt, would you not?

A. If I had observed it carefully.

X-Q. 89. If you had looked at it?

A. I did not look at it. If I had I would not have known whether it was the manufacturer or the jobber.

X-Q. 90. But you would have known that it was a receipt of P. Lorillard Company?

A. I would have known that it was headed P. Lorillard Company, but I would not know him from anybody else. He did not explain whether he was the manufacturer or jobber when I bought this.

X-Q. 91. But he handled the receipt of P. Lorillard Company?

A. That is a receipt of P. Lorillard Company.

X-Q. 92. You say you never heard of P. Lorillard Company before you went into business?

A. I did not.

X-Q. 93. Do you use tobacco?

A. No, sir, in no way, shape or form.

X-Q. 94. You would not have occasion to become acquainted with the merits of the tobacco yourself?

A. No, sir.

X-Q. 95. Likewise the merits of any other tobacco, whether it is Climax, Old Virginia cheroots—individually you paid no attention to that?

A. Looked like all other Beech-Nut products to me. I



did not notice the name. If I had I would not have known whether it was the jobber or anybody else.

X-Q. 96. You don't know anything about the tobacco business?

A. No, sir.

X-Q. 97. You did not know that P. Lorillard was one of the largest tobacco concerns in the world?

A. I did not.

X-Q. 98. You never purchased any goods of the Beech-Nut Packing Company, either food products or chewing gum, that was marked or dressed like this package of Beech-Nut scrap tobacco, with the sunburst and red radiating lines?

A. I never paid any particular attention to the lines. All I went by was the name. That was all I went by. I did not notice the fixings on the packages. A variety of goods ordinarily have different packages.

X-Q. 99. I show you a Beech-Nut bean and bacon label, which is in evidence in this case as Defendant's Cross-Exhibit 8. That is an original Beech-Nut Packing Company's label?

A. Yes, sir.

X-Q. 100. With a wide red band, and the printing on the band like other Beech-Nut goods?

A. Yes, sir.

X-Q. 101. There is no such red band arrangement on that cigarette (exhibiting same)?

A. I would not observe the package so closely. I just go by the name Beech-Nut. That is what I go by.

X-Q. 102. As a matter of fact, I notice you have in your store here some display of Lorillard's Beech-Nut cartons?

A. Yes, sir.

X-Q. 102. And it is quite a large and attractive display?

A. Yes, sir.

X-Q. 103. For example, I notice over your tobacco counter you have these cartons piled up in a pyramid-like form, and these cartons are each about a foot high, a foot to a foot and a half, and that stack of cartons is probably in the neighborhood of 8 feet high, is it not?

A. Yes, I suppose seven and a half or so.

X-Q. 104. In other words, your Beech-Nut scrap tobacco display runs from the top of your shelf to the ceiling, does it not?

A. Yes, sir.

X-Q. 105. And you also have these Lorillard cartons displayed on top of your refrigerator?

A. Yes, sir.

X-Q. 106. One of the things that would strike you, or an ordinary observer in that whole display is that red sunburst?

A. Ordinarily, but I would not pay particular attention to that—just the name.

X-Q. 107. Look at these red and white lines.

A. It is labelled all right.

X-Q. 108. You never saw the Beech-Nut Packing Company's name on Lorillard tobacco, did you?

A. I did not see whether it was Lorillard or not. This young man came in, and I thought it was a Beech-Nut product.

X-Q. 109. You never bought any tobacco from the Beech-Nut Packing Company?

A. I never have bought anything but some beans, peanut butter and chewing gum, and the tobacco was from Lorillard, I offered for sale as a Beech-Nut product.

X-Q. 110. And the tobacco, you did not take the trouble to see who made it?

A. No.

X-Q. 111. If a man came into your store, and he said, I want a package of Beech-Nut chewing gum, would you

hand him a package of this tobacco or cigarettes in place of the chewing gum he asked for?

A. No, sir.

X-Q. 112. You would think he was crazy if he had asked for tobacco if he wanted chewing gum?

A. I would not know.

X-Q. 113. If he had come in and asked for Beech-Nut chewing gum?

A. He would be liable to ask for one or the other.

X-Q. 114. Suppose he had asked for gum?

A. I would hand him gum.

X-Q. 115. If you went into a store yourself and said, I want a package of Beech-Nut chewing gum, and that is what you did want, and they tried to make you accept a package of tobacco or cigarettes, in the place of chewing gum, what would you do?

A. I would object.

X-Q. 116. You would not be confused into taking gum for tobacco?

A. No, I would want gum.

X-Q. 117. They are entirely different kinds of goods?

A. Yes, sir.

X-Q. 118. Different class of goods altogether?

A. Yes, sir.

*Redirect Examination by Mr. Johnson.*

R-D. Q. 119. To go back to your conversation at the time Mr. Larson went into your store—what was the impression made on you as a result of his conversation and his conduct at the time he was in your store?

A. He left me under the impression that he was putting out a Beech-Nut product made by the Beech-Nut people, and, as I say, these Beech-Nut products were selling fine, and I was under the impression the tobacco would go the same way, and I told him I would try a small

quantity of it. I would not keep much on hand, therefore, I took a dozen packages. I was not able to carry any larger stock, as you notice. I carry a very small stock of any kind of goods.

R-D. Q. 120. And whose product did you think this tobacco was at the time that you made that first purchase from Mr. Larson?

A. I thought it was the Beech-Nut Packing Company's product. I thought it was put out by the Beech-Nut people.

*Re-Recross Examination by Mr. Cavanagh.*

R-X Q. 121. You did not ask the man if the Beech-Nut Packing Company put it out?

A. I did not have to ask. I went by the name.

R-X Q. 122. The word Beech-Nut, and nothing else?

A. Yes, sir.

R-X Q. 123. That is all that you paid any attention to?

A. Yes, sir.

R-X Q. 124. You did not pay any attention to the name on the package—Lorillard?

A. No, sir.

R-X Q. 125. Nothing else whatever?

A. Just the name is all that I noticed about.

*Re-Redirect Examination by Mr. Johnson.*

R-D. Q. 126. When you say, only the name you noticed on the package, did you notice the label?

A. The name and the label, yes.

Objected to as leading.

Received subject to objection.

*Re-Recross-Examination by Mr. Cavanagh.*

R-X Q. 127. This is not a Beech-Nut label is it?

A. It looks like it.

R-X Q. 128. The Beech-Nut and the palm leaf, do they look alike (indicating and pointing)?

A. Since those fine points have been pointed out, they do not look alike.

R-X Q. 129. Here is a Lorillard package of tobacco with the wide red lines—that is not a Beech-Nut Packing Company label?

A. No, it is not, but in general appearance they look alike.

R-X Q. 130. This has a single Beech-Nut with three green leaves in the center?

A. Yes, sir.

R-X Q. 131. And the other has two red beech-nuts on the back?

A. Yes, sir. If you point them out, if you observe very closely, you can tell the difference.

R-X Q. 132. As a matter of fact, you would not say they were alike, would you?

A. They look alike.

R-X Q. 133. Do you mean to tell me that that one (indicating) is like the one with the red band with the printing on it?

A. Look like Beech-Nut.

R-X Q. 134. The word Beech-Nut is what confuses you?

A. As to appearance, they look all the same to me.

R-X Q. 135. The word Beech-Nut?

A. Yes, sir.

R-X Q. 136. Would say that this Beech-Nut package (indicating) looks like that tobacco package?

A. I never noticed that closely.

R-X Q. 137. Any red radiating lines?

A. No, sir.

R-X Q. 138. You never paid any attention to that at all?

A. No, sir.

R-X Q. 139. As a matter of fact, to close up this whole thing, is it not a fact, as you said, it was just the word "Beech-Nut" that you were thinking about?

A. It was Beech-Nut products made by the Beech-Nut people.

R-X Q. 140. That word "Beech-Nut" is what struck you?

A. It is the name.

R-X Q. 141. Just the name Beech-Nut?

A. I was under the impression that it was made by the Beech-Nut people.

R-X Q. 142. And you thought it was all right because of the name Beech-Nut?

A. Sure.

R-X Q. 143. As a matter of fact, that was the only thing you noticed; you did not pay any attention to anything else?

A. Only the name.

Deposition of this witness closed.

The signing of the testimony by this witness expressly waived.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,	}	
<i>Defendant.</i>		

Deposition taken on behalf of the plaintiff before A. D. McFaddin, a notary public for the State of South Carolina, acting as Special Examiner, by consent of counsel, pursuant to notice and by agreement of counsel at the office of said A. D. McFaddin, Clark Law Building, Washington Street, Columbia, S. C., beginning Friday, January 27, 1922, at 12:30 o'clock P. M.

Present: H. McClure Johnson, Esq., of Offield, Poole, Hinton & Scott, for the Beech-Nut Packing Company; R. B. Cavanagh, Esq., of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

RICHARDSON S. MARKS, a witness produced on behalf of the plaintiff, pursuant to notice and agreement of counsel, being first duly sworn, in response to questions propounded by Mr. Johnson, deposes as follows, to-wit:

By Mr. Johnson: Q. 1. Your name is?

A. Richardson S. Marks.

Q. 2. Your residence?

A. 2734 Wheat Street, Columbia, S. C.

Q. 3. Your age?

A. In my 64th year.

Q. 4. Your occupation?

A. A printer and newspaper editor.

Q. 5. What is your business connection and where?

A. At present I have no regular business. I am a

printer and Tyler for the different Masonic bodies in the city.

Q. 6. What is your business connection in the printing business?

A. I am with the DuPre Printing Company, 1316 Main Street, and have been for about 20 years. On account of labor troubles here we are out.

Q. 7. What newspaper were you connected with?

A. The old Columbia Register.

Q. 8. In what city?

A. Columbia, S. C., for ten years or more. Telephone editor in the office was one of my specialties.

Q. 9. Do you hold office in any societies?

A. I am Tyler for all the Masonic bodies that meet up town, all the Masonic bodies that meet in the city, and a life member of one of them.

Q. 10. Anything else?

A. I have been secretary in Columbia of the typographical union for several years and a member of the volunteer fire department association. The old companies went out of existence, but I was a member until relieved by the city.

Q. 11. Any other societies?

A. Nothing, except that I have been a Pythian for 43 years.

Q. 12. What other connections?

A. I was one of the founders of Arsenal Hill Presbyterian Church.

Q. 13. Do you hold any position with the Shriners?

A. I am Outside Guardian for the Shriners, and have been for fifteen or twenty years. I know nearly every Shriner in the state.

Q. 13a. What is the name of the temple here?

A. Omar.

Q. 14. Do you know the products put out by the Beech-Nut Packing Company?



A. Yes, for I have used a good many.

Q. 15. How long?

A. Ever since they came on the market in Columbia as far as I remember, off and on.

Q. 16. About how many years?

A. I don't know, maybe, about ten years, as far as I can remember, and I bought Beech-Nut products on their reputation.

Q. 17. Please name some of the Beech-Nut products you have used.

A. Sliced bacon, pork and beans, their marmalades, and other things that I have bought. I don't remember, household goods ordered by my wife, and I have bought them myself.

Q. 18. What have you thought of them?

A. I bought them on their reputation and warranty for purity, and I have always found them satisfactory.

Q. 19. What does the Beech-Nut Packing Company label mean to you?

A. I considered when I bought anything made by them that it was pure and not adulterated. That is the reason I bought them on account of their reputation for purity.

Q. 20. I show you a package of Beech-Nut cigarettes now in evidence in this case as Plaintiff's Exhibit No. 1. When did you first see or notice any of those cigarettes?

A. Coming into the city from Shandon I noticed the city placarded with Beech-Nut cigarettes.

Q. 21. About when was that?

A. I don't know. Last fall some time. I could not remember just when; and I simply got disgusted as soon as I saw that this concern that I had a great respect for was manufacturing cigarettes.

Q. 22. Where did you see this?

A. On the boards and in show windows.

Q. 23. When you saw them, who did you think was putting them out?

A. The manufacturers of food products.

Q. 24. What company was that?

A. The Beech-Nut Produce Company, or whatever they call themselves. I thought they were manufactured by the same company, whatever company handles them.

Q. 25. Manufactured you thought by the Beech-Nut Packing Company? What made you think that?

A. The name and the label.

Q. 26. What was the effect on you of seeing that cigarettes were being put out by the Beech-Nut Packing Company?

A. I was under the impression that the cigarettes were being put out by the company designated and meeting Mr. Thornton, I knew he was the representative of the Beech-Nut Company, I told him I was very much surprised and disgusted at the Beech-Nut people for manufacturing and putting out something that would ruin people.

Q. 27. That would ruin people?

A. That is what I told him, and I had made up my mind and told my wife I was going to cut it out, as she is as opposed to cigarettes as I am, until Mr. Thornton told me the house he represented were not the manufacturers of that product, and that they were not dealing at all in tobacco.

Q. 28. What did you mean by cutting it out?

A. Not going to buy any more of the stuff, to put a boycott on it. I was disgusted at a concern like that putting cigarettes on the market.

Q. 29. You mean Beech-Nut Packing Company?

A. Beech-Nut Packing Company.

Q. 30. What would you say is your attitude towards those who put out cigarettes?

A. I think they are a menace to the man that uses them, and I have no use for anything like that, which ruins young men and boys. That is my impression about them. Whatever induces boys to smoke, whatever leads them to that habit that is injurious to them I am opposed to.

Q. 31. What is your attitude towards those who put out cigarettes?

A. I will not buy their products; I do not smoke cigarettes, and I will not buy from any one who manufactures cigarettes.

Q. 32. Are there many people of your acquaintance in Columbia that have the same attitude towards the products of those who put out cigarettes?

Mr. Cavanagh: I object. That is hearsay.

Witness: It is not hearsay, because I have asked them. I have spoken to others who are of the same opinion, that they had no use for them.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 33. Did you ever buy any of those Beech-Nut cigarettes?

A. No, but I bought chewing tobacco.

X-Q. 34. You have never examined the tobacco or the cigarettes?

A. Never have. I have seen them.

X-Q. 35. How often do you buy chewing tobacco?

A. I have bought it for my son, and he asked me for Beech-Nut chewing tobacco.

X-Q. 36. You have bought it for quite a number of years?

A. No, only three or four times when he was sick,

and he would get people who waited on him to buy it for him.

X-Q. 37. You did not buy it for yourself?

A. No, if I used tobacco I would have thought the Beech-Nut people manufactured it.

X-Q. 38. But you would have looked at the package to see who made it, to see what was in the package?

A. If I was using Beech-Nut tobacco I would ask for Beech-Nut because I go by the word Beech-Nut, and thinking it was a guaranty of purity.

X-Q. 39. You would not have taken the trouble to read what was on it?

A. I saw Beech-Nut, and I go by the word Beech-Nut.

X-Q. 40. The name on it?

A. Yes. I went by the word Beech-Nut and the red label. I like to use it on the table because it is pure. I used Beech-Nut products in the eating line, and when I saw they were manufacturing cigarettes—I assumed they were making them until I was informed by Mr. Thornton that they had nothing to do with it. My son told me to get Beech-Nut because he thought it was pure.

Mr. Cavanagh: That part as to what his son thought is objected to.

Witness: I would have bought it on the strength of its purity if I was using it.

X-Q. 41. But you have bought the tobacco products?

A. No, I have no use for it.

X-Q. 42. You have never looked at the package?

A. I see the leaf and the palmetto.

X-Q. 43. You have noticed P. Lorillard Company?

A. No, I have no use for them.

X-Q. 44. You did not look at them close enough to see?

A. I did not.

X-Q. 45. You did not read anything on the package?

A. I saw Beech-Nut, and the shape.

X-Q. 46. That is all you noticed?

A. Yes, and I thought from the package it was manufactured by the Beech-Nut Packing Company.

X-Q. 47. You consider cigarettes in a different class from food products?

A. I certainly do.

X-Q. 48. You think they are in an entirely different class?

A. I do. I think one will kill, and the other will not.

X-Q. 49. If you went into a store and asked a man for a package of Beech-Nut chewing gum, if he handed you a package of Beech-Nut tobacco, would you be confused or deceived into taking the tobacco and those cigarettes in place of the chewing gum that you had asked for?

A. I would know the difference.

X-Q. 50. You would know by the difference?

A. I mean by the difference in the package. I don't know what you are driving at. If I wanted a package of Beech-Nut gum and he wanted to give me cigarettes would I know it was manufactured by the man that manufactured Beech-Nut products?

X-Q. 51. You did not get my question, and I would like for you to pay attention to me. If you went into a store and asked a man for a package of Beech-Nut gum, if he handed you a package of cigarettes, would you be confused into taking the cigarettes when you wanted gum?

A. Certainly not. A man of common sense would not. If I went for cigarettes I would not take gum.

X-Q. 52. You would not take gum?

A. No, I would not.

X-Q. 63. You would know the difference in the class of goods?

A. I would know one was tobacco. I would know that one was harmful and the other was not.

X-Q. 54. One was tobacco?

A. Yes, sir.

X-Q. 55. And the other a food product?

A. Yes, sir.

X-Q. 56. And there would be no confusion, the gum being a food product?

A. Yes, sir.

X-Q. 57. You never knew of this Beech-Nut Packing Company selling tobacco, did you?

A. As far as my knowledge goes I did not until I saw their sign, and I presumed they were and I told Mr. Thornton about it.

X-Q. 58. Then he immediately told you his concern did not make tobacco?

A. Yes, sir.

X-Q. 59. As I understand from your deposition, you are absolutely opposed to the use of cigarettes and do not use them yourself, and you say the manufacture of them and the using of them is not right?

A. Yes, sir, but that would not bias my opinion on any question.

X-Q. 60. It is merely a fact that you do not use them?

A. No.

X-Q. 61. You are opposed to the use of cigarettes?

A. Yes, I am.

X-Q. 62. If a concern was putting out cigarettes and food products at the same time you would not buy food products from that concern?

A. I would not, because cigarettes are a menace to the community, to the boys that are coming up.

X-Q. 63. You think they are in a different class from food products?

A. Certainly. One kills and the other will not. Cigarettes or tobacco will kill some people, while food products, if eaten in moderation, will not. A man can't smoke in moderation, seems like. He will smoke more and more and more.

X-Q. 64. I further understand from your testimony that when you saw these Beech-Nut cigarette signs as you were coming to the city instead of speaking to any one about it you stopped purchasing Beech-Nut products, food products, and without regard to whether they were doing it or not?

A. I made up my mind to stop right off.

X-Q. 65. You made up your mind and acted immediately and boycotted the Beech-Nut men?

A. No, I met him in a store and said, I am disgusted with your house, you are putting out something that is killing people. He said we had nothing to do with that, and I told him I had made up my mind to cut it out. If I had not seen him I would not have bought anything that had Beech-Nut on it.

X-Q. 66. Would you not have taken the trouble to inquire before you cut out the company?

A. No, I would not have taken the trouble because I had no doubt it was nobody but the Beech-Nut people.

X-Q. 67. Did you ever hear of Star hams?

A. Yes, I use them.

X-Q. 68. You have heard of Star soap?

A. Yes, and I don't use it.

X-Q. 69. You have heard of Star chewing tobacco?

A. No, sir.

X-Q. 70. You have heard of Star soap?

A. Yes, sir.

X-Q. 71. You would not immediately quit a man who had been in the habit of selling you Star soap because you heard he was selling Star hams, and you were op-

posed to the use of hams, you would not deprive him of any sales by withdrawing your trade without making any inquiry about the matter?

A. No, I don't think I would.

X-Q. 72. You would not deprive him of his sales to you without first asking him about it just as you did Mr. Thornton?

A. I did not think I had any occasion to do anything like that.

X-Q. 73. But you did, as a matter of fact, tell him?

A. If I thought it was injurious, and I was opposed to it, I thought it was right to tell him.

X-Q. 74. In this very case you did make inquiry?

A. I did not make inquiry. I just twitted him about it. If I had not known Thornton I would have gone on without telling any one.

X-Q. 75. If you had gone on and cut out Beech-Nut without taking the trouble to find out——

A. It did not take any trouble because I had confidence in the word Beech-Nut.

Deposition closed and the signing of testimony expressly waived.

Deposition closed at 1 o'clock P. M.

*State of South Carolina, Richland County:*

I, A. D. McFaddin, a notary public in and for the county and state aforesaid, acting as Special Examiner, by consent of counsel, do hereby certify that the accompanying depositions of Jefferson D. Hayden and Richardson S. Marks were taken in behalf of the Beech-Nut Packing Company, the plaintiff, pursuant to notice and by agreement of counsel, before me at Columbia, S. C., on January 27, 1922; that the foregoing witnesses were by me duly sworn; and that the testimony of said wit-



nesses was taken down by me in shorthand, and thereafter reduced to typewriting by me; that the opposing party hereto was represented by Richard B. Cavanagh, Esq., during the taking of said testimony; that the said testimony was taken in the City of Columbia, S. C., beginning as to Jefferson D. Hayden, at 10:20 o'clock A. M., and ending at 11 o'clock A. M. on January 27, 1922; and as to Richardson S. Marks, at 12:30 o'clock P. M., and ending at 1 o'clock P. M. on said 27th January, 1922; and that the signatures of said witnesses to their respective testimony was expressly waived as indicated on the depositions.

I am not connected by blood or marriage with either of the parties hereto or interested either directly or indirectly in the matter in controversy.

I also certify that I have been paid my fees as Special Master and for copies taken in accordance with the attached bill the sum of Twenty-Three and Fifty Hundredths (\$23.50) Dollars.

In witness whereof I have hereunto set my hand and official seal this 27th day of January, 1922.

A. D. McFADDIN,  
Notary Public for S. C.

(My commission expires at the pleasure of the Governor of South Carolina.)

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, <i>Plaintiff,</i>	} In Equity, No. 3056.
<i>vs.</i>	
P. Lorillard Company, <i>Defendant.</i>	

Deposition taken on behalf of plaintiff, before Edna R. Greer, Notary Public, acting as Special Examiner, by consent of counsel, pursuant to notice and by agreement of counsel, beginning February 9, 1922, at 11:30 A. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, on behalf of plaintiff; Richard B. Cavanagh, of Meyers, Cavanagh & Whitehead, on behalf of defendant.

FRANCIS E. BARBOUR, a witness produced on behalf of plaintiff, is resident more than one hundred miles from place of trial. His deposition is taken in New York, by agreement of counsel, and is to be considered as being taken as part of, and with, the Canajoharie depositions, witness being temporarily in New York City. Witness being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Francis E. Barbour; you are 51 years of age; you reside in Canajoharie, N. Y., and you are vice-president of the Beech-Nut Packing Company; is that correct?

A. That is correct.

Q. 2. How long have you been connected with the Beech-Nut Packing Company, plaintiff in this case, and in what capacity?

A. Since January 1, 1910, in the capacity of secretary and latterly vice-president, covering general charge of the management and sales and advertising.

Q. 3. Mr. Barbour, what is the so-called "Beech-Nut policy"?

A. With your permission I will read what we have published in many magazines, newspapers and otherwise as the Beech-Nut policy, and which is as follows:

"There are discriminating people in every community who want to purchase the best. These are our friends. They have made our business—our reputation. It is on account of them that we have determined never to offer for sale any article under the Beech-Nut label until we are satisfied that it is better than any similar article."

We have published that for several years as our policy advertisement. I might amplify that by saying that our policy is to purchase the very best raw materials available; to manufacture them in clean, wholesome, sunny, bright surroundings, by intelligent help, well paid, who realize what they are making and to distribute our products through our regular channels in a way which will satisfy them and remunerate them for so doing and reach the consuming trade with goods which will give them confidence and satisfaction, for we do not consider our job done until we have satisfied the consuming trade.

Q. 4. Can you state off-hand, the number of products which the Beech-Nut Packing Company has offered to the public?

A. I have not counted them up, but I am satisfied over sixty.

Q. 5. What, if any, particular point have you, and do you emphasize in your sales effort to the trade and public?

A. In our sales and advertising, which is a part of our sales, we emphasize high quality and character of all our products—all the products bearing Beech-Nut name (of which there are a large number, and which we continue to add to from time to time), and we expect that our rep-

utation of the past will help make an easy market for us in the future with whatever new lines we may bring out from time to time.

Q. 6. Can you give me a concrete illustration of what you mean by emphasizing and selling on the Beech-Nut reputation?

A. We have sold, for so many years, on our reputation; in selling the trade not only the individual articles which we make, but also the name of Beech-Nut, its reputation for character and flavor, that when we bring out any new article, the consuming public, retailers and jobbers, are willing to accept any new article we bring out under the name "Beech-Nut" and give us an opportunity to demonstrate to them that it is going to satisfy them—that is, the jobbing trade. They are mighty good to us; when we bring out a new product, they give our boys an order. After they have once tried it, we have got to make it good enough so they will continue to buy it.

Q. 7. How does this general sales effort and general sales policy, which you have described, affect the requirement that Beech-Nut goods be always up to the Beech-Nut standard of quality?

A. Well, we have spent over twenty-five years in building up the present good-will and reputation for character and high quality that it is absolutely obligatory that we make everything we bring out of a high character which will compare favorably with what people have enjoyed in the past, so that when they take any new article we bring out they will feel full assurance that it will match up in character and quality with what has given them satisfaction, under the Beech-Nut name in the past.

Q. 8. What would be the affect on your reputation in business if the Beech-Nut Packing Company should come out—for instance, with some new product and the purchasers buying that product should be completely disappointed in the product?

A. Why, we would jeopardize our entire line if we continued to market anything that would not fulfill what the public are entitled to expect under the Beech-Nut name.

Q. 9. Can you state any illustrative instance which would indicate the degree of care exercised by the Beech-Nut Packing Company to make sure that the products it offers do in fact come up to the Beech-Nut standard of quality?

A. Why, we have a case right now. We have been six or seven years in developing a salted peanut, and we have not mastered the production of salted peanuts to our satisfaction yet. There are a number of salted peanuts on the market, put out under some very well known brands, which have been well advertised and highly exploited, and which are enjoying a very large trade, as we understand it, but none of them, in our estimation, are good enough to bear the Beech-Nut trade-mark. We have not been able to produce a salted peanut yet that would not become rancid in a short time or deteriorate to such an extent that we would not want to put it out under our brand.

Q. 10. Has your company, in the past, come out with new products which are quite different from products which it had previously made? In answering, will you give any particular illustrations of this which occur to you?

A. Up until 1912 we had confined ourselves pretty well to food products. That year we brought out Beech-Nut chewing gum, which met with instant reception, and has enjoyed an increasingly large sale all the time. That is somewhat different from our food line, and in 1919 we brought out beverages—ginger ale, sarsaparilla and root beer, which is merchandise of the same trade, but not a food product, possibly.

Q. 11. What was the reception of Beech-Nut ginger ale by the trade and public?

A. Sold from the start.

Q. 12. And to what do you attribute this popular reception of Beech-Nut ginger ale?

A. To the name "Beech-Nut," its trade-name and the name that is associated with it.

Q. 13. Do you intend and expect to continue to bring out new products from time to time?

A. We do. It is fair for us to presume that we will follow the precedent of the past and intend, from time to time, to bring out new lines as we feel we find something which enjoys a good distribution and represents a profit to us, if manufactured and distributed right. I think we will continue to enlarge our line. I have every reason to believe it.

Q. 14. Has your sales effort and sales policy been intended and designed to prepare the public to accept new products from time to time?

A. I feel so. I think the precedent of the past leads the trade and public to expect new things under the Beech-Nut label at any time. We have sold the name Beech-Nut flavor and quality and advertise it to build up a good-will surrounding the name Beech-Nut, so that whenever the public or anyone else finds "Beech-Nut" on anything, they are entitled to believe it is made by the Beech-Nut Packing Company and up to the quality we have always endeavored to maintain.

Q. 15. Would it be within the natural and ordinary expansion of your business to add cigarettes to your line?

A. Well, in one way it would. We are now calling on the tobacco trade, the grocery trade, the drug trade—all of which handle cigarettes and tobaccos, and from that standpoint it would be most consistent for us to handle

cigarettes. We could merchandise them without any added expense as far as our salesmen are concerned in salaries and traveling expenses. On the other hand, there are a great many people who are buying Beech-Nut products, and women buying most of them, who are opposed to tobacco in any form, which might make us feel we might not want to handle tobacco or cigarettes.

Q. 16. What, if any, importance do you attach to the fact that the trade-mark "Beech-Nut" is the same as the distinctive part of the name of your company?

A. We think it is a very happy thing that the name Beech-Nut is the same for the company as it is for the products. It would be very difficult for us to so closely ally Beech-Nut products with a company of another name than it would to ally them with a company bearing the same trade-name. Moreover, we rather feel that we get the personality of the Beech-Nut people into the goods more closely allied by having the company and name tied up together than we could otherwise get, and if we can maintain quality and character among our personnel that we do among our products, it strengthens the whole situation.

Q. 17. You may state, if you know, what the expression "Beech-Nut quality" means at the present time.

A. It means high standard of all the products which are brought out and merchandised by us—the Beech-Nut Packing Company.

Q. 18. To what extent, if at all, has that expression been popularized among the public by the Beech-Nut Packing Company?

A. The general tone of our advertising is quality, and we have used slogans which support that—if I may use that term—such as "You can't mistake the flavor," which implies that the flavor is delightful, delicious and of high quality.

Q. 19. You have mentioned the slogan, "You can't mistake the flavor." To what extent have you displayed that to the public?

A. Oh, we have used it for years in our magazine advertising and window displays, store signs, billboards—general publicity.

Q. 20. Has that been your main slogan, or one of your main slogans?

A. It has. We have used that, I think, more than any other, and it has been for several years—a number of years; just how long I do not remember. The advertising will support that.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 21. Mr. Barbour, I understand that you have been with the Beech-Nut Packing Company since 1910?

A. January 1, 1910.

X-Q. 22. And you have been there in the capacity of general manager and in charge of salesmen and advertising?

A. I have had general supervision. I have been what you might call assistant general manager until Mr. Lipe's departure from the company, over a year ago, and up to that time assistant general manager, and with general supervision of sales and advertising.

X-Q. 23. In other words, you are one of the principal officials of the company, and familiar with its business and development?

A. Yes, sir.

X-Q. 24. When you went with the Beech-Nut Packing Company in 1910, what goods was it selling; what articles or products was it putting on the market?

A. Bacon, beef, peanut butter, jams, jellies, preserves,



catsup, chili sauce, vinegar; we have added several since that. I think that was all, as I remember now.

X-Q. 25. They were putting out these products in 1910?

A. Yes, sir.

X-Q. 26. Now, I understand you have added certain products since that time?

A. Yes, sir.

X-Q. 27. Can you name what products you have added year by year?

A. We have added chewing gum, compressed tablets, known as mints, ginger ale, caramels; we are just starting to put out marshmallows now.

X-Q. 28. Was the Beech-Nut Packing Company putting out chili sauce when you went with them in 1910?

A. Putting out catsup. I do not think we made chili sauce until we opened our Rochester factory. We were making catsup—that I know.

X-Q. 29. How many people are employed in the Beech-Nut plant or factories?

A. At the present time?

X-Q. 30. Yes.

A. Rounding a thousand.

X-Q. 31. As I understand it, you say in about 1912 you put out chewing gum, and you also stated that it became very popular. Can you give me figures, or if you have not them available at this time, will you give me the figures, showing the yearly sales in dollars and cents of this Beech-Nut gum since 1912?

A. We can do that.

X-Q. 32. I understand you have advertised this Beech-Nut chewing gum quite widely. Is that so?

A. Have advertised it very little, except by sampling.

X-Q. 33. Do you keep any separate account of the amount of money you spend in advertising chewing gum?

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A. No. All our advertising is blocked and is protected on the basis of sales.

X-Q. 34. Will you explain to me just what you mean that, Mr. Barbour?

A. We, we feel that all our products, for instance, get the same benefit from any advertising which the Beech-Nut Packing Company does, because we advertise the Beech-Nut Packing Company and our label. Now, if we advertise an article—like Beech-Nut peanut butter, we will say—in one of the women's magazines, like the Ladies' Home Journal, of full page and display showing the Beech-Nut label, talk quality, embrace our slogan, enumerate the other products at the foot of the page, the entire line benefits, although the main "ad" is for peanut butter. Now, when it comes to accounting for the money spent for that "ad" the month that it appears, the cost of that "ad" is pro-rated against our sales of all our products for that month.

X-Q. 35. So that you have not any figures, or you do not keep any accounts which would show what the yearly expenditures you make of advertising chewing gum, do you?

A. No.

X-Q. 36. And likewise, I presume, that you have no accounts or statements, yearly or otherwise, which would show the extent of advertising of chewing gum—say, in a certain state, have you?

A. We can tell the amount of money expended in sampling, which is direct advertising of chewing gum in any state, but not magazine advertising, for instance; we can tell billboard advertising, of which we have done a little.

X-Q. 37. Now, I understand your figures would show, by state, for certain products, such as chewing gum, the amount of advertising in dollars and cents that you have done of sampling and billboard advertising?

A. Yes, sir.

X-Q. 38. I further understand that these records would be found at the home office, at Canajoharie, N. Y.?

A. Yes, sir.

X-Q. 39. And I ask you if the opportunity affords in the future, and if it is so deemed necessary, will you produce these figures for me?

A. Will be glad to.

X-Q. 40. Showing advertising in dollars and cents of advertising of various products in various states?

A. Yes, sir, subject to advice of counsel.

X-Q. 41. I understand that about 1919 you brought out beverages, such as ginger ale, sarsaparilla and root beer, and, of course, you continued to put Beech-Nut chewing gum on the market since 1912?

A. Continuously.

X-Q. 42. And both beverages and chewing gum are sold under the Beech-Nut label, are not they?

A. Yes, sir.

X-Q. 43. And that is the label with the red band?

A. Oval red band and the name "Beech-Nut," hyphenated, and representation of the Beech-Nut, regular registered trade-mark and the oval band.

X-Q. 44. Mr. Barbour, does not chewing gum come under the pure food laws?

A. Yes, sir.

X-Q. 45. And beverages likewise, such as ginger ale, root beer and sarsaparilla—they come under the pure food laws?

A. Yes, sir.

X-Q. 46. In your direct examination, you gave some testimony relative to the addition of tobacco products, such as cigarettes to the Beech-Nut line, did you not?

A. I did.

X-Q. 47. Did the Beech-Nut Packing Company ever hold itself out as a manufacturer of tobacco products to the public at large?

A. No.

X-Q. 48. Did you ever know a concern that was manufacturing package or food products that was engaged in the manufacture of tobacco?

A. I do not know of any—cannot think of any at this time.

X-Q. 49. Has your concern ever put any cigarettes on the market?

A. A few, in an experimental way only.

X-Q. 50. And when was that?

A. In 1919.

X-Q. 51. Can you give me the amount of these cigarettes and value of them that you put out?

A. I cannot. I know it was very small.

X-Q. 52. I call your attention to the record of the Beech-Nut Packing Company in United States Patent Office Trade-Mark Opposition 2805, P. Lorillard Co. *vs.* Beech-Nut Packing Co., involving trade-mark "Beech-Nut" for cigarettes, on pages 43 and 44 in the deposition of W. C. Arkell, a witness for the Beech-Nut Packing Company, reference is made to certain cigarettes supplied on invoice from the American Tobacco Co. to Beech-Nut Packing Co., and which cigarettes were shipped to B. Arkell, James R. Offield and a New Jersey Tobacco company. The amount of these as stated in record is 2060, with a total net cash value of \$11.85. Do you know is this the order or the amount of cigarettes that your company put out that is referred to there?

A. As far as I know, it is.

X-Q. 53. In other words, as far as you know, that shipment of \$11.85 worth of cigarettes was and has been the total effort of the Beech-Nut Packing Company in the tobacco field?

A. The total sales, as far as I know.

X-Q. 54. You have never ordered or installed any to-

bacco or cigarette making machinery at any plant of the Beech-Nut Packing Company, have you?

A. No, sir.

X-Q. 55. You have never purchased any stock of tobacco to be manufactured into cigarettes or other tobacco products?

A. We have purchased only very small lots of tobacco for experimental purposes only.

X-Q. 56. About how much tobacco did you purchase for experimental purposes?

A. I do not imagine more than \$50 worth at the outside.

X-Q. 57. Did you ever hire for your plant any expert blender or party familiar with the manufacture of tobacco products?

A. In an experimental way we had the services of a man who was recommended to us as one who had examined many tobaccos and blended them and were familiar with them.

X-Q. 58. Is he still with you?

A. No, sir.

X-Q. 59. And even at that time you did not get any machinery or equipment for going into the tobacco business?

A. No, sir.

X-Q. 60. Mr. Barbour, I call attention to a letter on the letterhead of the Beech-Nut Packing Company, and it is dated 6-11-1915. Was that letter signed by you?

Mr. Hinton: That is objected to as outside the line of direct examination.

Mr. Cavanagh: In order to save any extended statement on record, I will simply say that in this particular letter I intended to call Mr. Barbour's attention to a particular statement which he made, and which is in direct line with this examination.

X-Q. 61. In this letter of June 11, 1915, which you have identified, you make the statement, "While we have never as yet manufactured tobacco, the taking on of such manufacture in the future is by no means impossible or improbable." You made that statement, did you not?

A. Yes, sir.

X-Q. 62. Since 1915 your concern itself has not manufactured or marketed any tobacco products in that seven years' period, has it?

A. We marketed this small lot in 1919.

X-Q. 63. I mean beside that small lot?

A. No, sir.

X-Q. 64. And that small lot was made practically four years after the writing of this letter, was it not?

A. Yes, sir.

X-Q. 65. I also call your attention to a letter dated July 18, 1915. Is that your signature?

A. Yes, sir.

Mr. Hinton: Objection is repeated. This matter is outside the line of direct examination, and it is stipulated that objection may apply to further testimony of this character, without repetition.

Mr. Cavanagh: This witness has testified as to the probability and liability of the Beech-Nut Packing Company going into the tobacco and cigarette business. This correspondence is directly in line with the subject-matter of witness' testimony.

X-Q. 66. I show you letter of 7-2-15 or July 2, 1915. Is that your signature, Mr. Barbour? You wrote that at that time?

A. Yes, sir.

X-Q. 67. I also call your attention to a letter of 7-26-15 or July 26, 1915. Is that your signature?

A. It is.

X-Q. 68. Did you write that letter at that time?

A. I did.

X-Q. 69. I also call your attention to letter dated August 7, 1919, and signature thereto. Did you write that at that time, Mr. Barbour?

A. Yes, sir.

X-Q. 70. I also call your attention to letter dated 8-28-19, or August 28, 1919, and another letter dated October 8, 1919. Is that your signature to those letters?

A. Yes.

X-Q. 71. And you wrote these letters at that time?

A. Yes.

X-Q. 72. These letters were all sent to the Lorillard Company?

A. They were sent to whoever they were addressed to. I did not look at them.

X-Q. 73. I think they were.

Mr. Hinton: Further objection is made to the testimony above and introduction of correspondence on the ground that it is incomplete.

X-Q. 74. Then, as early as 1915, or as early as June 11, 1915, when you wrote the letter of that date, you knew the P. Lorillard Company was putting out a Beech-Nut scrap tobacco, did you not?

Mr. Hinton: This is entirely outside the line of direct examination. Counsel is warned that in pursuing this line he is making the witness his own.

X-Q. 75. What is your answer to that?

A. Yes, sir.

X-Q. 76. As early as 1915 you were referring orders for Beech-Nut tobacco which came to the Beech-Nut Packing Company, to P. Lorillard Company for filling, weren't you?

A. We did. Misdirected mail we naturally forwarded them.

X-Q. 77. You also wrote to your customers who sent in these letters or people who sent these letters and told them Lorillard was making that tobacco, did you not?

A. In many instances.

X-Q. 78. Now you have spoken of the value of your Beech-Nut trade-mark and how it stands with the public as identifying your goods or goods of the Beech-Nut Packing Company, and you have also stated, as the correspondence to which I have directed attention shows, that you knew as early as 1915 that P. Lorillard Company was putting tobacco on the market under the name of Beech-Nut. You took no legal action in 1915 to stop the Lorillard Company from putting out this tobacco?

A. No, sir.

Mr. Hinton: Objection and warning repeated.

X-Q. 79. And no action was taken until the filing of this present suit?

A. Legal action you say?

X-Q. 80. Yes.

Mr. Cavanagh: The letters identified by witness as bearing his signature are at this time marked for identification, it being understood between the parties that the complete correspondence between the parties to the suit will be introduced at a later date. It is stipulated by and between the parties that any further material produced by this witness from the records at Canajoharie may be introduced as part of this deposition and that this witness will be produced for further cross-examination with respect to such additional material at the request of counsel for defendant.



*Redirect Examination, Without Waiver of Objections,  
by Mr. Hinton.*

R-D. Q. 1. Mr. Barbour, could you undertake to give from memory a complete list of all of the products put out by the Beech-Nut Packing Company in various years you were with them?

A. No, sir.

R-D. Q. 2. Do you remember, and can you say how much chewing gum was sold by the Beech-Nut Packing Company in the year 1921?

A. Over ten million boxes.

R-D. Q. 3. And how many packages in a box?

A. Twenty packages.

R-D. Q. 4. How many sticks in a package?

A. Five sticks.

R-D. Q. 5. Are these sticks individually wrapped?

A. They are.

R-D. Q. 6. And do they bear on each stick the Beech-Nut trade-mark?

A. They do.

R-D. Q. 7. You have referred to the sampling of chewing gum, for instance. Will you please explain that phrase?

A. We give out to the consuming public, through our salesmen, or through people specially employed for that purpose, free samples of chewing gum, consisting of single sticks, wrapped with the regular wrapper but having in addition thereon, "free samples."

R-D. Q. 8. State if you know whether you have distributed signs and placards advertising Beech-Nut chewing gum?

A. We have.

R-D. Q. 9. Were these for display in retail stores?

A. Yes, sir.

R-D. Q. 10. Do you know to what extent you have done that? In other words, whether it was a good deal, very little, or what?

A. Many thousand signs. Advertising is such a broad thing it is hard to say whether it is little or large, but many thousand.

R-D. Q. 11. And would it be necessary for you to have cigarette making machinery at your plant in order to merchandise Beech-Nut cigarettes?

A. We could get cigarettes made for us by a regular manufacturer, under our label, we to do the distributing.

R-D. Q. 12. Who conducted the negotiations, if there were negotiations, with the Lorillard Company, prior to the beginning of the Patent Office action, which was begun in 1919? I mean who conducted those negotiations on behalf of your company?

A. I wrote the correspondence.

R-D. Q. 13. Do you know whether Mr. Arkell had anything to do with that?

A. He was consulted.

R-D. Q. 14. Were you present at the conference between the officials of the Lorillard Company and the Beech-Nut Packing Company in the summer of 1919?

A. No, sir.

R-D. Q. 15. Do you know whether there was further correspondence between Mr. Arkell and the Lorillard Company?

A. I believe there was. My recollection is there was.

R-D. Q. 16. What was the condition of affairs at the Beech-Nut Packing Company plant during the war? Were you short handed or not?

A. We were disturbed like everybody else, and were short handed and had difficulty in getting all the help

we wanted. Business was difficult in every way—manufacturing and merchandizing.

R-D. Q. 17. Do you consider that the war period was a suitable time within which to undertake litigation?

A. I think it would be a very bad time. Everybody's time was taken up with production matters more than with legal matters at that time.

Redirect examination closed.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 1. You brought out new products, though, during the war, did you not?

A. Oh, I am not quite sure on my dates. I am free to say we brought out new flavors of similar products we were making.

R-X Q. 2. What is Jaffee? Did not you bring that out in 1917?

A. Yes, sir.

R-X Q. 3. Is not it a substitute for coffee?

A. It is a meal-time drink. Yes, that is a product which has been on the market for many years.

R-X Q. 4. Oh, you were bringing it out before 1917?

A. No.

Deposition closed.

Signature waived.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, <i>Plaintiff,</i>	} In Equity, No. 3056.
vs.	
P. Lorillard Company, <i>Defendant.</i>	

*State of New York, County of New York, ss:*

I, Edna R. Greer, notary public, in and for said county and state, acting as Special Examiner, by consent of counsel, do hereby certify that the foregoing deposition of Francis E. Barbour was taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, this deposition being taken by agreement of counsel in New York to suit the convenience of the parties but is to be considered as taken with the Canajoharie depositions; that the deposition was taken at 120 Broadway, February 9, 1922, beginning at 11 A. M., and ending the same day; that the witness was by me duly sworn; that the testimony of said witness was taken down and reduced to typewriting under my supervision, and that the signature of witness was waived by agreement of counsel; that I am not related by blood or marriage to either of the parties hereto, or interested directly or indirectly in the subject-matter involved.

EDNA R. GREER,  
Notary Public.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT  
OF NEW JERSEY.

Beech-Nut Packing Company }  
                                  *vs.* } Equity No. 3056.  
P. Lorillard Company. }

Depositions taken in behalf of the plaintiff pursuant to notice and by agreement of counsel by and before Fred M. Geortner, a notary public in and for the County of Montgomery, State of New York, acting as Special Examiner by consent of counsel beginning February 10, 1922, at 11 A. M., ending February 11, 1922, at noon.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh & Whitehead, for P. Lorillard Co.

It is stipulated that if Stanton Van Wie were called he would testify that he is the advertising manager of the Beech-Nut Packing Company and that the photograph marked by the notary public, Plaintiff's Exhibit No. 15, actually represents a collection of the line of products being manufactured and sold by the Beech-Nut Packing Co., February, 1922. These products being collected by the witness and the photograph taken under his supervision and compared with the original by him.

It is further stipulated that carton marked by notary public, Plaintiff's Exhibit No. 16, is an illustrative portion of the cardboard cartons used by the Beech-Nut Packing Co. to ship products.

It is further stipulated that carton marked by notary public, Plaintiff's Exhibit No. 17, is a cigarette carton heretofore distributed by the defendant.

It is further stipulated that the Imperial Packing

Co. was incorporated February 10, 1891. That the Beech-Nut Packing Co., plaintiff, the successor of the Imperial Packing Co., was incorporated December 29, 1899. Production of certified copies of certificates of incorporation is hereby waived.

It is further stipulated that the publication, *Bon Jour*, marked by the notary public, Plaintiff's Exhibit No. 18, was published on or about the date appearing therein, viz., Dec. 4th and 5th, 1891, at Canajoharie, N. Y., and is authentic.

By Mr. Hinton: Plaintiff's Exhibits 15, 16, 17 and 18 are offered in evidence.

MRS. EDITH B. KEARNS, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Edith B. Kearns. You are of legal age and an assistant to the advertising manager of the Beech-Nut Packing Company, the plaintiff in this case. Is that correct?

A. Yes.

Q. 2. How long have you been in the advertising department of the Beech-Nut Packing Co.?

A. I have been employed in the advertising department of the Beech-Nut Packing Company for eight years. During that time I have had charge of the official records of the advertising department covering publications, magazines, distribution of dealers' advertising.

Q. 3. Can you produce specimen of the Beech-Nut Packing Co.'s advertisements showing the various kinds of advertising, display cards, publications, booklets, etc.?

A. I can produce six books showing samples of our advertising material.

Book No. 1 shows advertising cards for dealers' displays.

Book No. 2, reproduction of paintings in panel form for dealers' display.

Book No. 3, miscellaneous—counter cards, window displays, etc., for the retail dealers' stores.

Book No. 4, small counter cutouts, shelf trims, etc.

Book No. 5, collection of booklets, inserts, folders, etc.

Book No. 6, portfolio of Beech-Nut advertisements appearing in various publications.

Q. 4. I notice that this book No. 6 begins with the year 1916 showing portfolio of advertising beginning January of that year. Does that mean that you were doing no publication advertising prior to January, 1916?

A. It does not. We did an enormous amount of advertising prior to 1916. I have in the office here books showing clippings of ads from all magazines in which we have advertised. The books, however, are so large to handle that I have had them photographed as I was unable to bring the books in the evidence.

Q. 5. This photograph which you have produced shows a number of large scrap books containing what apparently are clippings pasted in these scrap books. Do I understand that each clipping in every one of these scrap books represents an actual advertisement that has been run in some paper or publication?

A. The clippings included in the scrap book were actually taken from magazines.

Mr. Hinton: The photograph produced in evidence by the witness is offered in evidence as Plaintiff's Exhibit No. 19.

Q. 6. I notice that one of the scrap books in this

photograph is marked 1911. Did the Beech-Nut Packing Company according to your best information advertise in newspapers, magazines and other publications prior to 1911?

A. I understand that it did advertise in newspapers, magazines and other publications prior to 1911, but I have not the clippings to show.

Q. 7. In order to avoid a very lengthy discussion with respect to these various publications or advertising material, I will ask you, did you prepare from the official records of the company a tabulated list showing the number of the various signs and booklets in these books which were distributed by the Beech-Nut Packing Co.?

A. I have prepared a tabulated form for each one of these books showing the date each piece was distributed and the number of pieces distributed.

Q. 8. Where did you get this information?

A. From the official records of the company which have been in my charge for over four years.

Mr. Hinton: Please produce that book. Book produced by witness is offered in evidence as Plaintiff's Exhibit No. 20.

Q. 9. Do I understand that you are willing to repeat as part of your testimony, the statements as to the time of distribution, quantity distributed, etc., given in this book?

A. I am willing to repeat the statements made in that book. They were made from the official records and they are correct to the best of my knowledge.

Q. 10. Can you tell me how many pieces of advertising cards included in books Nos. 1-4 have been distributed by the Beech-Nut Packing Co. to be displayed before the public?



A. The advertising pieces shown in books Nos. 1-4 are approximately 2000, or to be exact, 1,990,700.

Q. 11. 2,000?

A. 2,000,000. To be exact 1,990,700.

Q. 12. Do these books Nos. 1-4 include all the display material of this character which has been distributed by the Beech-Nut Packing Co.?

A. It does not. It would be impossible to put in book form all the advertising actually done because we have not the space to show it.

Q. 13. If you included the advertising display material of all kinds illustrated in the books Nos. 1-4 and included that which you have just referred to, how many pieces would you estimate have been distributed?

A. As a conservative figure I would say probably 2,500,000.

Q. 14. Does this estimate include the distribution of booklets included in book No. 5 which you have produced?

A. No, it does not. It includes only dealer advertising in books Nos. 1-4.

Q. 15. It does not include any publication advertising or billboard advertising?

A. It does not.

Q. 16. Now take the billboard advertising. Has the Beech-Nut Packing Co. according to your records and information done extensive billboard advertising?

A. It has done billboard advertising in the form of painted signs, lithographed signs pasted on billboards, which cover approximately the United States.

Q. 17. For instance, how many billboard advertisements is the Beech-Nut Packing Co. running now?

A. You refer to both the painted and lithographed?

Q. 18. Yes.

A. I would say 2500.

Q. 19. Where are these for the most part located?

A. They are distributed along the main thoroughfares and railroads.

Q. 20. What appears on these billboards—is it the name Beech-Nut or the Beech-Nut label?

A. Generally the name Beech-Nut.

Q. 21. Do the billboards advertise single product or a variety of products?

A. A variety of products.

Q. 22. Returning now to the particular style of card illustrated in book No. 1, which you have produced, how are these displayed by the dealer?

A. They are displayed in card frames which are furnished free of charge to them for display purposes.

Q. 23. Have you any idea how long they will remain in the stores?

A. Our salesmen never collect them up. I would say for years.

Q. 24. What has been the chief advertising slogan of the Beech-Nut Packing Co.?

A. You Can't Mistake the Flavor.

Q. 25. Has this been displayed on billboards and other display matter?

A. It has. It shows on the advertising matter on the front page of book No. 3.

Q. 26. Will you state to the best of your knowledge and information and from the best information that you can get from your records, how many times the phrase, "You Can't Mistake the Flavor" has been displayed to the public in connection with the Beech-Nut Packing Co.'s products exclusive of publication advertising?

A. I would say 250,000 times exclusive of publication and magazine advertising.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 27. Will you please tell me just what your duties are in the advertising department?

A. My duties in the advertising department are taking charge of the official records of the advertising department covering advertising in publications, distribution of dealers' advertising, etc.

X-Q. 28. Do you have complete charge of the advertising records?

A. I do have complete charge of the advertising records of the company.

X-Q. 29. Under whose direction were these books shown prepared?

A. I supervised the preparation of the books.

X-Q. 30. You put in these books a specimen of all the advertising of the Beech-Nut Packing Co.?

A. Specimen—yes, but not a sample of each advertising piece which we have.

X-Q. 31. I understand that. To make myself clear—these books contain at least one specimen or one advertisement of each of the products manufactured by the Beech-Nut Packing Co., do they not?

A. To the best of my knowledge.

X-Q. 32. As I understand it, the Beech-Nut Packing Co. makes about seven or eight dozen different kinds of products. Is each one of those products represented in these books?

A. I believe they are.

X-Q. 33. Each illustration shows Beech-Nut label with the red band?

A. Some only show the word Beech-Nut. For instance, where the book is open now only shows Beech-Nut.

X-Q. 34. So the red band Beech-Nut label is not always featured in the advertising?

A. It is not.

X-Q. 35. As I understand it, the Beech-Nut Packing Co. also packs and markets some other brands like the Mohawk and Erie, does it not?

A. I believe so.

X-Q. 36. Do these books show any specimen of the Mohawk and Erie advertising?

A. They advertise only Beech-Nut products.

X-Q. 37. Are not the Mohawk and Erie products of the Beech-Nut Packing Co.?

A. I believe they are recognized as such.

X-Q. 38. Can you produce for me specimen of labels as used on the Mohawk and Erie products?

A. I have no records covering the labels—only advertising.

X-Q. 39. So far as you know the Beech-Nut Packing Co. does not advertise the Mohawk or the Erie brand?

A. I have in my records advertising only covering Beech-Nut products.

X-Q. 40. You mean Beech-Nut products bearing that particular label?

A. Beech-Nut products mean to me only those with Beech-Nut label.

X-Q. 41. At the same time if the Beech-Nut Packing Co. packs a Mohawk brand that would be a Beech-Nut product, would it not?

A. The marketing and packing of products is not under my supervision.

X-Q. 42. You draw a distinction between this red band and the Mohawk and Erie brands?

A. I have no Mohawk and Erie brand labels.

X-Q. 43. You produced here in evidence Plaintiff's Exhibit No. 20, history or statement of the Beech-Nut

advertising material, which appears to start with book No. 1, page 1, and concludes with book No. 6.

A. Yes.

X-Q. 44. Now turning, for example, to page No. 1 of this Exhibit No. 20, I find that it refers to the sliced bacon card issued in 1909 and bears the statement "Quantity distributed 5000 in all states east of the Mississippi." Is there anything in your records to show in what specific states these cards were distributed?

A. There is not, only the fact that our salesmen covered the entire United States and this material was placed in their hands—not the entire 5000 because some of them were posted in the street railways.

X-Q. 45. So you have no means of telling me how many cards were distributed in each state?

A. No, I have no means of telling you how many cards were distributed in each state.

X-Q. 46. To save a long drawn out examination, you have no way of telling from your records, have you, so far as concerns the advertising in these books, you have produced, as to how many you have distributed in each state?

A. I have no means of knowing how many were distributed in each state.

X-Q. 47. You have no means of telling the value of advertising in each state?

A. I have no means of telling the value of advertising in each state.

X-Q. 48. So far as the records go, you may have distributed four thousand cards in one state and may be two thousand in another?

A. That I cannot say.

X-Q. 49. You cannot tell anything about the amount distributed in these states?

A. Not by states.

X-Q. 50. Have you any records to show the value in dollars and cents of the amount of advertising in each state?

A. I have no records showing the value in dollars and cents of the amount of advertising in each state. I have no record of material distributed by states.

X-Q. 51. There is no way of telling whether you spent \$5000 in a certain state or 5 cents?

A. There is no way.

X-Q. 52. I notice in these portfolio or books that you produced in evidence, in fact, I think in several, a number of advertisements relating to chewing gum. I want to ask you how long you have been with the Beech-Nut Packing Co.

A. Eight years.

X-Q. 53. That would bring us back to 1914?

A. 1914.

X-Q. 54. Now, since you have been connected with the company, have you any records to show the amount in dollars and cents of the advertising matter of Beech-Nut chewing gum?

A. I have only the records which you have before you of the quantity of material distributed on that particular product.

X-Q. 55. So far as chewing gum is concerned, I presume that same condition exists in regard to this book, "Exhibit No. 20"; that is, it does not show the quantity of advertising matter relative to Beech-Nut chewing gum which has been distributed in the different or separate states?

A. I have no record of advertising distributed by separate states.

X-Q. 56. It is simply a lump statement of advertising?

A. Yes.

X-Q. 57. There is no way of knowing what each state gets and if one state gets more than another?

A. My records are not kept by states.

X-Q. 58. Do you have anything to do with the records showing the amount in dollars and cents expended in various products of the Beech-Nut Packing Co.?

A. I have only to do with the material distributed. I have nothing to do with the financial end of the business.

X-Q. 59. Or whether the records show they expended \$1000 or \$1,000,000?

A. I would know nothing about it.

X-Q. 60. You spoke of a slogan that the Beech-Nut Packing Co. was using.

A. You Can't Mistake the Flavor.

X-Q. 61. That is the slogan that appears on the first page of book No. 3?

A. That is the slogan the Beech-Nut Packing Co. has used on some advertising material.

X-Q. 62. The Beech-Nut Packing Co. has also used another slogan—"Foods of Finest Flavor"?

A. I believe so.

X-Q. 63. I call your attention to certain pages which I have taken from the Ladies' Home Journal, issues of November, 1920, January, 1921, March, 1921 and May, 1921. Those four pages represent Beech-Nut Packing Company's advertisements, do they not?

A. They do.

X-Q. 64. Each of these pages bears the slogan, "Beech-Nut Foods of Finest Flavor," do they not?

A. Yes.

X-Q. 65. Will you look at these advertisements and see if you can find the slogan, "You Can't Mistake the Flavor"?

A. The slogan, "You Can't Mistake the Flavor" appears on the advertisements shown here.

The four sheets from Ladies' Home Journal above referred to as taken from issues of November, 1920, January, 1921, March, 1921 and May, 1921, are offered in evidence. Notary is requested to mark the same "Defendant's Cross-Exhibit No. 15."

X-Q. 66. I call your attention to the book No. 6. It is entitled "Beech-Nut Packing Co. Portfolio Book No. 6." I notice that this book starts in 1916 and ends 1921. For instance, turning to first page, which has another pamphlet or books attached thereto, how do you fix the date that these were published in 1916?

A. They were made from ads appearing in the magazines, which advertising is handled by our agency in New York.

X-Q. 67. What I mean there are no dates or anything to show that they were published in 1916.

A. I have checked these books with the books showing the clippings of advertisements taken from various publications.

X-Q. 68. These pencil dates in 1916 were placed here by you?

A. I placed them there as I checked them.

X-Q. 69. So to the best of your knowledge and belief they were published in 1916?

A. To my best knowledge and belief they were published in 1916.

X-Q. 70. Same applies to other years?

A. Yes.

X-Q. 71. I notice on the cover sheet of this portfolio book No. 6 a statement showing the Beech-Nut policy. It starts, "There are discriminating people in



every community who want the best." Do you know how you use it?

A. That is a copy we use in our advertising copy. If you go through these you will find it appears in these publications.

X-Q. 72. Not being familiar with the book, will you point it out to me?

A. That is simply an advertisement on the front of the book in getting up the book. (The same was pointed out.)

Cross-examination closed.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 73. Did you make any effort to compare the price lists of the Beech-Nut Packing Co. and other information showing what each and every product in the various years has been with these books in order to make absolutely sure that there would be an advertisement of each and every Beech-Nut product somewhere in these books?

A. I did not.

R-D. Q. 74. You then did not try to find out whether every Beech-Nut product that was ever put out was advertised in these books?

A. I did not.

By Mr. Hinton: These books produced by witness are offered in evidence as Plaintiff's Exhibits Nos. 21-26 and are so marked by the notary.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 75. So far as the illustration of the ads of the Beech-Nut Packing Co., these books may or may not be complete.

A. I have no way of telling whether these books advertise all the Beech-Nut products or not.

Recross-examination closed.

Deposition closed.

MRS. EDITH B. KEARNS.

JOHN S. ELLITHORP, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is John S. Ellithorp. You are fifty-seven years of age; you are the treasurer of the Beech-Nut Packing Co.; is that correct?

A. Yes.

Q. 2. How long have you been with the Beech-Nut Packing Co.?

A. Since 1904.

Q. 3. In what capacity?

A. As manager of the peanut butter and conserve department, as treasurer and at one time I had construction of buildings under my charge.

Q. 4. Mr. F. E. Barbour in a deposition given yesterday referred to you as a person in charge of work on salted peanuts. Will you tell us when the Beech-Nut Packing Co. first began to try to develop salted peanuts?

A. As near as I can remember about five years ago. All the salted peanuts that we were able to buy on the market were very poor and we thought we could improve that condition. The peanuts (salted peanuts) sold right here in town made by prominent manufacturers were very poor. We thought we could make them better so that they would be suitable to go out un-

der the Beech-Nut brand. We did a lot of work on them. I did a lot of work myself and Roy Davis did a lot. We had three or four different people working on them, but we have never been able to put out the quality that we wanted to put out under Beech-Nut brand. We are still working on it. In our laboratory here Mr. Mastin has a dozen experiments on the way. None of those are successful so far. I opened a box a few days ago. They were not fit to eat. We have used different kinds of oil, conut, etc., and went so far as to use mineral oil and once in a while we thought we had a satisfactory product. I remember at one time we had twenty different experiments under way. We used different temperatures—360 degrees, 320 degrees and so down, but we never got a first class product.

Q. 5. Have you any memo. or notes in your possession showing the dates of the various experiments?

A. Yes, I have some of them—not all of them, but I think I can dig up some more, at least for the last series two or three years ago. I think Roy Davis may have some—I have not all of them.

Q. 6. I simply want to get the earliest recorded date of the work on salted peanuts.

A. I can give you that all right by looking it up.

Q. 7. Will you please do so before the close of this session?

A. Yes.

Q. 8. Had you in your employ people who were familiar with peanuts and had worked in peanuts before you began this experiment?

A. I think all our men are experienced. We have men who know how to roast, how to cook and who know how to see that the work is done right. I think probably our men know as much about that condition as anybody. I, myself, have bought all the peanuts that

we ever bought and I am thoroughly familiar with the quality, whether they come from Asia, come from Africa or Texas. I have made trips to Texas to look over the business there.

Q. 9. How long have you manufactured peanut butter?

A. Ever since 1905.

Q. 10. Is that one of your leading products?

A. Yes, because we make it good it is popular.

Q. 11. Did you feel when you tried these experiments and have you since felt that it would be profitable to your company to put out salted peanuts?

A. Absolutely. We are in a fine condition to buy peanuts.

Q. 12. Why did you not put out salted peanuts as good, for instance, as those which are now being sold on the market?

A. Because we did not want to put out anything under the Beech-Nut brand that is not first class, because if we put out, for instance, salted peanuts that were not first class, not as good as the Beech-Nut peanut butter, it would hurt the other products. Unfortunately, we have put out some lines of goods which were not as good as a Beech-Nut product should be. We have always called them in. We had one experience that cost us \$32,000. We put out a lot of prunes packed in San Jose, Cal. which were not satisfactory and we had to call them in, which we did do. There are some other things which we have started but fell down horribly.

Q. 13. Whenever you have found any product put out under the Beech-Nut label that was not satisfactory, what have you done?

A. We have always taken them off the market and we are glad to do it.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 14. Did I understand you to say that you had charge of the construction department here?

A. Yes, at one time.

X-Q. 15. When you come here in 1904, what buildings did they have here?

A. They had only the brick buildings and wooden buildings—no concrete buildings.

X-Q. 16. How many people did they employ in those days?

A. I was the seventh in the office.

X-Q. 17. How many in the plant?

A. I do not know.

X-Q. 18. You can tell by the books, can't you? I mean approximately.

A. Probably one hundred. That is a guess. I was the seventh in the office. Now there are a hundred in the office.

X-Q. 19. Was peanut butter the only product of which you had charge?

A. No, the conserves. All the conserves, jams, jellies, marmalades, etc.

X-Q. 20. Never manufactured tobacco products?

A. No, sir.

X-Q. 21. Never had anyone under your charge expert in the manufacture of tobacco products?

A. No.

X-Q. 22. Never put any machinery in this factory for the manufacture of tobacco products?

A. No, sir.

X-Q. 23. Did you ever have charge of any products that were put out under Erie or Mohawk brands?

A. No, sir.

X-Q. 24. Do you know the Beech-Nut Packing Co. has such brands?

A. Yes, sir.

X-Q. 25. Would you mind telling me just what those brands are?

A. I do not know as much about this as some of the rest of the people. The fact is, as I understand it in buying meats, I will take for instance beef—I understand it is desirable to buy sets. In buying sets, all the meat is not first quality, therefore all that meat is put in another brand. This is as I understand it, but I am not sure about it.

Mr. Hinton: This is objected to as outside the line of direct examination and it is stipulated that this objection may apply without repetition to similar questions.

X-Q. 26. In this salted peanut experiment—there are salted peanuts on the market that are fairly satisfactory?

A. That are fairly satisfactory, yes, sir.

X-Q. 27. Your experiments have not been able to bring your product to that point?

A. We have made salted peanuts just as good as any on the market, in my judgment.

X-Q. 28. What seems to be the trouble?

A. They are not good enough for us to sell.

X-Q. 29. What do you mean? To sell under the Beech-Nut label?

A. To sell under the Beech-Nut label.

X-Q. 30. Although they might be sold under some other brand?

A. Yes.

Cross-examination closed.

Deposition closed.

JOHN S. ELLITHORP.

STANTON VAN WIE, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Stanton Van Wie. You are twenty-seven years of age. You are resident advertising manager of the Beech-Nut Packing Co. Is that right?

A. Yes.

Q. 2. Is your advertising handled by a New York agency?

A. By New York agency.

Q. 3. How long have you been in your present position?

A. Since August, 1920.

Q. 4. What were you doing before that?

A. In the sales department of the Beech-Nut Packing Company.

Q. 5. How long have you been with the Beech-Nut Packing Company?

A. Barring my time in the army I have been steadily with them since April, 1917.

Q. 6. Would you tell me what the advertising appropriation was for the year 1920?

A. For the year 1920? I have not the figures right here—not for 1920. I imagine it was around \$500,000.

Q. 7. For the year 1921?

A. Approximately \$550,000.

Q. 8. Do you expect to spend more or less in 1922?

A. More.

Q. 9. Are those figures a fairly close approximation to the actual advertising expenditures?

A. Yes.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 10. I understand that you have had charge of the advertising department since 1920?

A. Yes, August, 1920.

X-Q. 11. You say for the year 1920 you spent about \$500,000 in advertising?

A. Yes.

X-Q. 12. Just what was the character of that advertising?

A. It was magazine, newspaper, billboards, outside signs, subway posters, dealers' display material, moving picture slides, illustrations for dealers' displays, and trade papers of course.

X-Q. 13. The advertising expenditures for 1921 you say amounted to about \$550,000?

A. Yes.

X-Q. 14. I think you mentioned appropriation but I believe you meant expenditure?

A. That includes everything—departmental expense, overhead, light, etc.; that is, all expenses of this advertising department.

X-Q. 15. So the sums you have given for the years 1920-1921, \$500,000 and \$550,000 include all overhead expenses?

A. Yes, as far as this advertising department is concerned.

X-Q. 16. It also includes the expenses of distributing the advertising material, maintaining publication advertising, etc., does it not?

A. Yes.

X-Q. 17. The Beech-Nut Packing Co. puts out a large number of products, does it not?

A. Yes.

X-Q. 18. Would your figures show or can you tell



me the exact amount spent in dollars and cents for advertising each product or item marketed by the Beech-Nut Packing Co.?

A. No, sir.

X-Q. 19. Your records of figures would not show any such statement of appropriation for each specific line?

A. No, it would be impossible.

X-Q. 20. Likewise could you tell me or would your records show the amount in dollars and cents expended in advertising in each of the various states of the United States?

A. No, sir.

X-Q. 21. Then you have no records which would indicate, for example, what amount was spent in advertising Beech-Nut products in New York State or Illinois?

A. No, sir. If I might give an example, we advertise in New York City theatre programs, New York City being a metropolitan center, is visited by people from all over the United States. We feel from an advertising standpoint that the theater has an influence in the sale of the products all over the United States even though a product is advertised in New York City alone.

X-Q. 22. So far as your records show, you could not give by states the amount of advertising done in any particular state?

A. No, sir.

X-Q. 23. Take, for example, chewing gum. Have you any figures which would show in dollars and cents the amount of advertising that you did in the year 1920 over 1921?

A. In dollars and cents on chewing gum during 1920 over 1921? No, sir.

X-Q. 24. No way to tell the United States as a whole?

A. No way, because there is no way to prorate that advertising to apply to Beech-Nut chewing gum specifically.

X-Q. 25. The advertising account simply goes to the whole business?

A. It cannot help but be that way. When we advertise Beech-Nut it affects more or less every product on the list.

X-Q. 26. For example, you do not have one man in charge of what might be called advertising gum?

A. You refer to advertising sales? No, sir.

X-Q. 27. It all comes under general advertising head?

A. Yes, as far as advertising is concerned.

X-Q. 28. So these figures you have given for the years 1920-1921, \$500,000 and \$550,000 would not represent the amount actually handed over to newspapers or magazine people or to the advertising men who actually put these goods out?

A. It would include all kinds of advertising.

X-Q. 29. And all your overhead expense at Canajoharie?

A. Yes, but that is very slight when compared to the whole.

X-Q. 30. How many employees have you in your department here under your supervision?

A. Eleven or twelve I believe.

X-Q. 31. That includes the clerical help?

A. Yes.

X-Q. 32. You say that your advertising, so far as outside advertising, is handled by an advertising agency in New York?

A. As far as magazine, newspaper advertising, etc. are concerned.

X-Q. 33. What concern?

A. H. K. McCann Co.

X-Q. 34. What is their address?

A. 61 Broadway, New York City.

X-Q. 35. I understand it is the practice of your company in putting out advertisements to include a list of all the products.

A. In a majority of ads.

X-Q. 36. For example, call your attention to certain sheets from the Ladies' Home Journal which were introduced in evidence and marked as "Defendant's Cross-Exhibit No. 15." I note that on these pages you have a list of products running from bacon at the top to chewing gum on the bottom, that is, you mean various items collected in one advertisement, is it not?

A. Yes.

X-Q. 37. Although as shown by these sheets from the Ladies' Home Journal certain items in a particular advertisement might be emphasized. For example, November, 1920, issue features Beech-Nut sliced bacon. That advertisement also embraces other products of the Beech-Nut Packing Co. That is the practice you usually follow, is it not?

A. Yes.

X-Q. 38. To sum up, there is no way of telling from your records as to precisely what amount is spent in advertising on any one particular article?

A. No way of really telling.

X-Q. 39. Is your publication advertising of local or national character?

A. National.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 40. You have been asked about the advertising of the Beech-Nut chewing gum. You have referred to publication advertising and also to certain display material such as included in these illustrative

books, Plaintiff's Exhibits Nos. 21-26. Is there any other display material that has been more widely distributed advertising Beech-Nut chewing gum?

A. There is a display box in which the gum is shipped.

R-D. Q. 41. Can you produce one of these display boxes?

A. I can and do.

R-D. Q. 42. Is this the display box in which the gum is always shipped to the dealers?

A. Yes.

R-D. Q. 43. This box has a cover containing a picture of Beech-Nut label. Within the cover hinged to the box is a flap containing on one side a Beech-Nut label in gold and red and blue and a gold border. On the other side there is a gold border and small placard. How is that flap intended to be displayed or used?

A. It is supposed to stand upright, to be seen by the customer.

R-D. Q. 44. Is that the only advantage?

A. It is to the dealer's advantage to be displayed that way.

R-D. Q. 45. How many of these boxes were distributed by the Beech-Nut Packing Co. to dealers last year?

A. My understanding is that there were ten million distributed in the year 1921.

That is all.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 46. You say there were ten million of these boxes of chewing gum distributed in 1921?

A. That is my understanding.

R-X Q. 47. What is the value in dollars and cents?

A. I do not know. That does not come under the advertising department.

R-X Q. 48. How do you know ten thousand were distributed?

A. From the sales records.

R-X Q. 49. It is merely hearsay?

A. A stock record sheet comes to my hands showing the number of boxes distributed and in that way I know how many boxes are distributed.

R-X Q. 50. There is no way of telling the value of the gum distributed?

A. I have no way of telling.

R-X Q. 51. You say that the products of the Beech-Nut Packing Co. are nationally advertised?

A. Yes.

R-X Q. 52. What do you mean, throughout the United States?

A. Throughout the United States.

R-X Q. 53. That is all the products of the Beech-Nut Packing Co.?

A. Yes.

R-X Q. 54. Since you have been in charge of the advertising department, have you nationally advertised tobacco?

A. Not to my knowledge.

R-X Q. 55. You have never nationally advertised Beech-Nut tobacco products?

A. Not to my knowledge.

Recross-examination closed.

Deposition closed.

STANTON VAN WIE.

By Mr. Hinton: The gum display box produced by the witness is offered in evidence as Plaintiff's Exhibit No. 27.

MARSHALL DAVIS, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Marshall Davis. You are forty-five years old. You reside in Canajoharie, N. Y., and are foreman of the meat department of the Beech-Nut Packing Co.; is that correct?

A. Yes.

Q. 2. How long have you been with the Beech-Nut Packing Company or its predecessor, the Imperial Packing Company?

A. I have been with them since 1891. I was here when the company was incorporated.

Q. 3. Under what name did the Imperial Packing Co. sell its products.

A. Beech-Nut.

Q. 4. When did they begin to do that?

A. Right off the reel.

Q. 5. Mr. Davis, could you describe the very earliest labels that were used by the Imperial Packing Co.?

A. I think I could.

Q. 6. Can you tell just what some of them were?

A. One of them was a ham label, another was a lard label and another was a cap label. The jar had the Beech-Nut design blown in.

Q. 7. Those were the earliest that you think of?

A. Yes.

Q. 8. If you were to be shown the early labels, could you identify them?

A. Yes.

Mr. Hinton: Board is shown on which appear labels.

Q. 9. I show you a board entitled "Illustrative Collection—Beech-Nut Labels Displayed to the Public, 1891-1921, which is marked for identification "Plaintiff's Exhibit No. 28." Please look at the labels or reproduction of labels which appear on this board in the upper left-hand region thereof and point out which ones you remember having been used.

A. I remember all of them. The first column to the left is a ham label, the second is a cap label which we put on the top of the jars. I remember the Fard Dates label, that is the billhead we used. The remaining labels under 1900-1905 column I remember. The beef labels in blue and one in yellow—I remember them all.

Q. 10. What about the labels in the second row under 1895-1900?

A. That is one of the cap labels we put on top of the jars.

Q. 11. Do you remember this label?

A. Yes, I used to put them on.

Q. 12. You are familiar with the remaining labels on the board?

A. Yes, all of them.

Q. 13. Will you look them over and see if there are any that you do not remember?

A. I know them all.

Q. 14. I understand you recognize all those labels?

A. I remember all of them.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 15. I now call your attention to the ham label under the column 1891-1895 bearing the label of the Imperial Packing Co. That label does not show any oval on it, does it?

A. No, but the oval label has always been used by the company.

X-Q. 16. So far as the labels of the Imperial Packing Company are concerned, I understand that you have shown on this board just exactly three of them, two under column of 1891-1895 and one under 1895-1900. Those are all the Imperial Packing Company's labels, are they not?

A. Yes.

X-Q. 17. They do not show the red oval label?

A. They do not show on those labels but we have always shown the oval.

X-Q. 18. How long was the Imperial Packing Co. in existence?

A. I could not tell you. I remember that it was incorporated in 1891, but we were in business two or three years ahead of that. I was with the company.

X-Q. 19. What goods were they engaged in making?

A. Beech-Nut hams, bacon and lard.

X-Q. 20. They were making food products?

A. Yes.

X-Q. 21. As shown by this column "1900-1905," the Beech-Nut Packing Co. had come into existence. It put out dates, sliced bacon, peanut butter, sliced beef; is that right?

A. Yes. I could not give the exact date before that. We started with bacon in glass, then beef and so on.

X-Q. 22. Those were all food products during that year?

A. Yes.

X-Q. 23. Could you say whether or not this represented all the lines or brands on different goods that were put out by the Beech-Nut Packing Co. or its predecessor, the Imperial Packing Co.?

A. Yes, I could say that all these labels represent



the goods but I could not say when these were put out.

X-Q. 24. You never knew the Beech-Nut Packing Co. put out cigarettes?

A. No.

X-Q. 25. You never knew them to put out cigarette products?

A. No.

X-Q. 26. When you first came with the Imperial Packing Co., how many men did they employ?

A. I was the first one. We cured our hams in a cellar and took them back of the barn and smoked them in a barrel. Then we had a smoke house a story and a half high. Before the fire we had moved into the Soles building. There was a clam stand down stairs—they sold booze, cider and had a bar. We had one room upstairs and started with three men. I was a boy cleaning out the office, carrying out the waste paper, etc., and going to school. From that time on it has grown to where it is now.

X-Q. 27. When the Imperial Packing Co. put out hams under the name Beech-Nut, did they not have some sort of a circular brand that was put on with a branding iron?

A. They always had a branding iron.

X-Q. 28. That was a circular brand?

A. I cannot recall that. I remember we used to brand the hams. We first heated the branding iron on a coal stove and then we used a gas or oil stove, I do not remember if it was circular but it always had Beech-Nut on it.

X-Q. 29. You could not recall if it was circular or not?

A. No.

Examination closed.

MARSHALL DAVIS.

WEBSTER DAVIS, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Webster Davis. Your age is thirty-seven. You are foreman of the ginger ale plant of the Beech-Nut Packing Co.

A. That is correct.

Q. 2. When did you come with the Beech-Nut Packing Co.?

A. In 1896.

Q. 3. What name was this company or its predecessor, the Imperial Packing Company, then using on its goods?

A. They were using Beech-Nut.

Q. 4. Can you describe some of the early labels used by the company or its predecessor up to 1896?

A. I can.

Q. 5. Kindly name some of the labels.

A. We had a ham label with Beech-Nut on it. We had a Beech-Nut lard label, about  $3\frac{1}{2}$ " x 9"; we also had a label which went on the strip of bacon. We had a jar with the emblem beechnut blown in the glass.

Q. 6. Would you recognize these early labels that were used in 1896 or prior thereto if you saw them?

A. Yes.

Q. 7. I now show you a collection of labels and ask you how many of these labels you can definitely identify and know we used. I direct your attention to the upper column "Illustrative Collection—Beech-Nut Labels Displayed to the Public, 1891-1921," and ask you how many, if any, of those in the first three vertical columns you can identify and remember.

A. I can remember the top label in the first vertical column, "Sweet Beech-Nut Ham," Imperial Packing Co. Also the lard label with the beechnut emblem in the corner.

Q. 8. You remember the cap label that went on the top of the jar?

A. I do, I handled them. I have also put the label on the Beech-Nut bacon jar. That is the second one in the third column. I also remember the label Fard Dates and the trade-mark blown in the glass. I recognize the Beech-Nut sliced beef labels—I remember all of them.

Q. 9. Have you an old jar which you know was used in those early days?

A. I have.

Q. 10. The old glass jar you have produced has a device blown in the side, has it not?

A. Yes. This jar had a beechnut blown in the glass. The jar had a recess or circle where the label was put on. It was hard job to get the labels right in the center of the recess.

Q. 11. Do you remember a fire the Beech-Nut Packing Co. had?

A. I certainly do.

Q. 12. What was burned?

A. The smokehouse.

Q. 13. When was this fire?

A. I do not remember.

Q. 14. Was the whole plant destroyed?

A. The whole plant was not destroyed. The office was not destroyed.

Q. 15. Was this fire prior to 1900?

A. It was prior to 1900. There is also a label which we used on Mollie's Jam. I think it was in blue and had an oval label.

Q. 16. Have you been able to find some of those labels?

A. I could not find one. I threw some labels away.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 17. You say you came with the Imperial Packing Co. in 1896?

A. Yes.

X-Q. 18. How many people were working here then?

A. I think eight or nine. We branded our hams before they were smoked. Now we brand them after we smoke them.

X-Q. 19. How many hams did you brand?

A. I should judge eight or nine hundred or one thousand a day. Business was very small. We worked half time and sawed wood in the winter time.

X-Q. 20. Was the business local, just around here?

A. No, we shipped to New York and that section, New York State.

X-Q. 21. How many fires did they have here to your recollection?

A. Only one fire to my recollection.

X-Q. 22. You have been here from 1896 up to the present time?

A. Yes.

X-Q. 23. The only thing destroyed in that fire was part of the smokehouse and the ice house?

A. Yes. The greatest damage was to the smokehouse.

X-Q. 24. How large was the smokehouse?

A. About forty feet long and I should judge fourteen feet wide. We had five houses, three stories high. We had a place for the fire and the other buildings we used for making the goods.

X-Q. 25. It was a wooden building?

A. Yes.

X-Q. 26. Sort of a shed?

A. It was an old building.

X-Q. 27. That was the only fire you ever had around here?

A. That is the only fire.

X-Q. 28. You have been here since 1896?

A. Yes.

X-Q. 29. You say you are familiar with all these labels?

A. Yes.

X-Q. 30. You are familiar with all the labels the Beech-Nut Packing Co. has put out?

A. I am.

X-Q. 31. Have you ever known of the Beech-Nut Packing Co. putting out tobacco?

A. No, sir.

Cross-examination closed.

Deposition closed.

WEBSTER DAVIS.

COLONEL DAVIS, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Colonel Davis. You are forty-seven years old and you reside at Canajoharie, N. Y.; is that correct?

A. Yes.

Q. 2. Are you connected with the Beech-Nut Packing Co., and if so, how long have you been connected with it?

A. Thirty years.

Q. 3. When did you come with the Beech-Nut Packing Co. or its predecessor, the Imperial Packing Co.?

A. In 1891.

Q. 4. What name did the Imperial Packing Co., the predecessor of the Beech-Nut Packing Co., put on its goods in those days?

A. Beech-Nut.

Q. 5. Would you be able to recognize the old labels used by the Imperial Packing Co. if they were shown to you now?

A. Yes.

Q. 6. Do you remember a fire at the plant of the Beech-Nut Packing Co.?

A. Yes.

Q. 7. What was destroyed?

A. Practically everything that we owned.

Q. 8. Your brother, Webster Davis, appeared to think that nothing much, except the smokehouse, was destroyed.

A. Practically everything was destroyed except the engine room.

Q. 9. In what building was the office and the smokehouse?

A. It was all together in one building, the smokehouse and office and the ice house with the exception of the engine room which was on the other side.

Q. 10. I show you a board marked for identification "Plaintiff's Exhibit No. 28" and direct your attention to the labels illustrated or displayed in the upper left-hand region of this board. Will you please state how many labels you recognize and know to be used by the company?

A. I recognize the ham and lard and the cap label which was put on the top of the jars. I recognize all

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the others. Beech-Nut trade-mark was blown in the glass jar. The rest of the labels I remember.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 11. You came with the Imperial Packing Co. in 1891?

A. 1891.

X-Q. 12. You have been with the Imperial Packing Co. or its successors, the Beech-Nut Packing Co., up to the present date?

A. Yes.

X-Q. 13. What do you do around here?

A. General superintendent of the plant.

X-Q. 14. You spoke of a fire. When was it?

A. The fire was in February, 1903. I am sure it was in February.

X-Q. 15. How many buildings was this plant composed of at that time?

A. It was composed of one building. The office, and as I remember it, we had ten smokehouses, we did our manufacturing in that building. We also had an ice house. The only thing that did not burn was the engine room and that was away from the main building couple hundred feet.

X-Q. 16. The concern in 1903 was known as the Beech-Nut Packing Company?

A. Yes.

X-Q. 17. How many men were employed here at the time of that fire?

A. That is a pretty hard thing to say. I could not answer that.

X-Q. 18. Approximately?

A. I could not say—I do not remember.

X-Q. 19. Were the buildings that were destroyed wooden buildings?

A. Yes.

X-Q. 20. Something like sheds?

A. They were all old buildings that the company had bought from other people, with the exception of the smokehouses which we built ourselves. They were all wooden buildings.

X-Q. 21. Was the office in the wooden building?

A. Yes. The smokehouses were directly back. They were all connected.

X-Q. 22. It was a very small plant in 1903?

A. Yes.

X-Q. 23. In those years their main products were such food products as ham, lard, sliced bacon and dates?

A. Yes.

X-Q. 24. From 1891 to about the time of that fire the main building was used in curing the hams and bacon?

A. Yes.

X-Q. 25. The hams were branded with an iron brand, it was a circular brand with Beech-Nut in the middle?

A. Yes.

X-Q. 26. Are you familiar with the labels that are shown on this chart?

A. Yes, I remember them all.

X-Q. 27. As superintendent you are familiar with the products as put out by the Beech-Nut Packing Co.?

A. Yes.

X-Q. 28. You never knew that the Beech-Nut Packing Co. put out any Beech-Nut cigarettes under any label?

A. No, sir.

X-Q. 29. You never knew that they put out tobacco



products in those thirty years, always thought they put out food products?

A. Yes.

X-Q. 30. That glass jar that has been brought in the case, what was that glass jar used for?

A. We used that for bacon and beef.

X-Q. 31. It was never used by the Imperial Packing Co.?

A. I am not sure about that, but I think it was—1899.

X-Q. 32. Still this design which was blown in this jar is supposed to be represented by the design in the third column of this chart under the figures or years "1900-1905"; is not that right?

A. That is the way it reads, but I think it was used before that.

X-Q. 33. The Imperial Packing Co. had gone out of existence by 1900 (1899 I think it was), so either that chart is wrong or your recollection as to the date it was used is wrong.

A. I do not remember it offhand.

X-Q. 34. Then the chart must be wrong right there. If the chart is wrong in one particular label, the chart might be wrong in more instances.

A. Yes.

X-Q. 35. We have one example of its being wrong?

A. Yes.

X-Q. 36. As a matter of fact it would be pretty hard to use any procedure to know just what years the labels were used?

A. It would.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 37. This jar about which you have testified contains a device similar to the device shown in the

third column of the exhibit board. I show you another jar marked "Patented Oct. 23rd, 1900," and containing a similar device blown in the glass; this jar being an open mouth or square neck jar, similar to the jar shown on the billhead, third column. Do you recognize this jar?

A. Yes.

R-D. Q. 38. One of these two jars, both of which contain the same device in the glass, has a restricted neck and the other a wide neck. Which of these two jars was used first?

A. The restricted neck jar was used first.

R-D. Q. 39. What appears on the bottom of the jar which you said was used in 1900?

A. Patented July 11, 1893, I. P. Co.

R-D. Q. 40. What does "IPCo." stand for?

A. Imperial Packing Co.

R-D. Q. 41. This jar so marked was used before the jar with the wide mouth?

A. Quite a while.

R-D. Q. 42. Do you know when this old restricted neck jar was found?

A. I do not know.

R-D. Q. 43. Do you know if it was before or after this exhibit board was made?

A. I do not know.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 44. As a matter of fact between the jars and the board we are all balled up.

A. Yes.

*Reredirect Examination by Mr. Hinton.*

R-D. Q. 45. I do not see how we are so balled up. Is there any vagueness in your mind as to which of these two jars was used first?

A. I could take the stand that the restricted jar was used first.

R-D. Q. 46. That jar has "I. P. Co." on the bottom and the jar with the open mouth was used after that?

A. It was used after the restricted neck jar. This jar with the restricted neck was hard to pack and that is the reason they discontinued using it, and changed to the straight-sided jar.

By Mr. Hinton: The jar with the restricted neck is produced and offered in evidence as Plaintiff's Exhibit No. 29 (Imperial Packing Co.'s jar).

The open neck jar of 1900 is offered in evidence as Plaintiff's Exhibit No. 30.

Deposition closed.

COLONEL DAVIS.

CHRISTINA CARSWELL, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Christina Carswell. You are of legal age. You reside at Canajoharie, N. Y. You are employed by the Beech-Nut Packing Co.; is that correct?

A. Yes.

Q. 2. What are your duties here?

A. Statistical manager.

Q. 3. Have you charge of the sales records and other records of the Beech-Nut Packing Co.?

A. Yes, sir.

Q. 4. Have you from the official sales records of the Beech-Nut Packing Co. compiled figures showing the number of Beech-Nut labels upon goods sold by the Beech-Nut Packing Co. which have been purchased by the public?

A. I have.

Q. 5. For what years?

A. From 1903 to 1921, inclusive.

Q. 6. Can you and will you produce a table showing total number of labels purchased on and with goods by the public for each year beginning 1903 and ending 1921?

A. I can and do.

The table produced by the witness is incorporated herein in the record.

TOTAL NUMBER OF BEECH-NUT LABELS BEFORE THE PUBLIC FROM 1903 TO 1921, INCLUSIVE, SHOWING THE TOTAL NUMBER AT THE END OF EACH YEAR STARTING 1903.

<i>Year.</i>	<i>Number of Labels.</i>
Ending 1903.....	1,837,891
" 1904.....	5,346,563
" 1905.....	10,964,830
" 1906.....	18,778,191
" 1907.....	25,742,398
" 1908.....	32,662,653
" 1909.....	41,987,617
" 1910.....	54,550,452
" 1911.....	87,010,061
" 1912.....	203,878,036
" 1913.....	581,711,537
" 1914.....	1,222,559,117
" 1915.....	2,026,989,344
" 1916.....	2,938,869,631
" 1917.....	3,877,934,085
" 1918.....	4,331,084,050
" 1919.....	5,326,808,020
" 1920.....	6,089,691,968
" 1921.....	7,421,562,658

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Q. 7. Were the figures in this table taken from the official records of the Beech-Nut Packing Co., used in its regular course of business?

A. They were except one year.

Q. 8. What year was that?

A. Half of the year 1910 and 1911.

Q. 9. Why did you not take those figures from the official records?

A. Because we cannot find the actual sales records for that period on all the products—we can for the jar goods but not the bulk goods.

Q. 10. What did you do for the figures for that time?

A. For the latter half of 1910 I simply doubled the first half of 1910, which is a very conservative record as our sales were increasing right along. For 1911 I took the latter two months and quadrupled these, which is a very conservative record, much lower than the actual sales were.

Q. 11. Can you and will you, if requested by the opposing counsel, produce and explain to him any and all the official records from which those figures were derived?

A. I can.

Q. 12. How much of a job would it be to collect and handle all the books that these figures were taken from?

A. It would be some job. It takes a big truck to lug them around.

Q. 13. Does this tabulation of the number of labels include any except the Beech-Nut labels?

A. It does not.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 14. I notice that this list or table which you compiled is entitled "Total Number of Beech-Nut Labels Before the Public from 1903 to 1921, Inclusive, Showing the Total Number at the End of Each Year Starting 1903." Just what do you mean, "Total Number of Beech-Nut Labels Before the Public"?

A. They are actual sales.

X-Q. 15. Do these figures which you term "Before the Public" include goods on the shelves of merchants, goods returned, samples and things of that sort?

A. They include samples and, of course, naturally would include goods on the shelves.

X-Q. 16. And would include returned goods which have been sent out and returned?

A. Yes.

X-Q. 17. So far as the purchasing public is concerned, there is no way of telling what goods reach the public or the number of goods returned in any particular year?

A. Returned goods are infinitesimal.

X-Q. 18. That does not answer my question. I asked if there is any way of telling what goods reach the public or the amount returned for any particular year.

A. Goods on the shelves are before the public. There is no way of telling about returned goods.

X-Q. 19. Can you tell from this table that you have given or from your knowledge that there was actually sold in 1921 seven billion?

A. That is accumulative total.

X-Q. 20. Then as I understand this table—I have probably a misconception of it—the figures, for instance, opposite 1921 which reads, 7,421,562,658, that includes all the labels that were put on Beech-Nut goods

not for the year 1921 alone but for all the years since 1903 or for a period of nineteen years; is that right?

A. Not the labels which were put on Beech-Nut goods but the labels which were put on Beech-Nut goods and actually sold.

X-Q. 21. But it includes the whole period of nineteen years?

A. Yes.

X-Q. 22. Then you have no table showing the number of items or goods sold in each year?

A. Yes, I can give you that.

X-Q. 23. I understand that you are in charge of the sales records of the Beech-Nut Packing Co.?

A. Yes.

X-Q. 24. Can you give me from your sales records the value in dollars and cents all the goods sold and delivered by the Beech-Nut Packing Co. under the Beech-Nut label since 1903?

A. Yes.

X-Q. 25. For each year?

A. Yes.

X-Q. 26. Will you compile such a list?

A. I will.

X-Q. 27. Can you give me the value in dollars and cents for each year of each particular item sold; for example, the amount of chewing gum sold in the year 1921 and its value in dollars and cents?

A. Yes.

Mr. Hinton: We have no objection to supplying counsel with any relative information, but as to whether or not we want to give him a complete tabulation of statistical sales of every item that the Beech-Nut Packing Co. has put out in dollars and cents since the beginning is a matter which must receive very careful consideration. Of course,

this information would be of the utmost use to a competitor. While not refusing the information at the present time, we must not be understood as promising to do this without further consideration.

Mr. Cavanagh: The counsel for P. Lorillard Co. is very glad that Mr. Hinton makes this statement. We have heard so much about this case, about the wonderful business in chewing gum and what not that this plaintiff has been doing and of the terrible damage that has been inflicted upon it by the Lorillard Co. in its tobacco business—this has particular relation to chewing gum, the counsel now insists that matters have come to a show down and that this plaintiff is called upon to produce an accurate, verified and sworn tables showing not only the total value of the business done in dollars and cents and paid to the Beech-Nut Packing Co. for each year since its inception, but counsel wants to know and demands the information as to the total value of the business done in each item for each state of the United States, if this information is on the books. The counsel also desires to have furnished a statement of the selling price of each package commodity put out by the Beech-Nut Packing Co.; that is, the market price at which it goes to the dealer or jobber in order that we may arrive at some conclusion as to the value of the business which the Beech-Nut Packing Co. alleges is being injured by the sale of tobacco by this defendant.

Mr. Hinton: This is a most extraordinary demand. If I understand it, we are to spend, undoubtedly, several weeks in order to supply counsel with not only the figures including the total



business of the Beech-Nut Packing Co., but the figures showing for each year the sales of every particular product the Beech-Nut Packing Co. made. And not only that, the sales of each particular product from the inception of the business in every one of the forty-eight states in the Union. If counsel regards this as part of his case, there are proper ways to get the information, but I certainly will not put into my case any such elaborate detail figures, even assuming that it would be possible in the face of the testimony given yesterday to compile the sales by states from the inception of the business. Obviously, this is a task that would take weeks and weeks in tabulating. As to the volume of chewing gum business, we would be very glad to give counsel the sales of chewing gum during each year if he wants it.

Mr. Cavanagh: Counsel for the defendant has called for certain data and now insists upon the production of same in connection with the examination of this witness. If it cannot be supplied under a period of certain weeks' time, the counsel is willing to wait for the preparation of this data. The plaintiff should have thought of the trouble it would cause when he filed this suit. As this information is important in view of the claims made by the plaintiff and in view of the isolated tables and figures which are produced, the counsel must insist upon this being supplied.

Mr. Hinton: We will get nowhere in arguing this matter here. Of course, it can always be referred to the court for instructions.

Mr. Cavanagh: The counsel for the defendant has asked for certain data. He intends to see that this request to furnish the data is complied with.

Mr. Hinton: I will supply the chewing gum figures if you want them. I will supply the figures relative to the annual business of the company. I have no intention whatsoever of supplying the sales of each particular item, which are approximately one hundred items, for a period of nineteen or twenty years, subdividing the sales of these items into particular states unless instructed to do so by the court. This is entirely irrelevant. If you need this as part of your case and it is proper to get it, you can always get it.

Mr. Cavanagh: In view of the attitude assumed by the counsel for the plaintiff any and all testimony given in this case relative to the alleged sales or extent of sales, or extent of business done by the Beech-Nut Packing Co. since its early inception, and particularly all tables and other statistical data relative thereto is now objected to as being incomplete, as not accurately showing the true state of affairs, and at the proper time motion will be made to the court to strike from the records all testimony and all data, statistical and otherwise, relative to the question of alleged extent of business done by the Beech-Nut Packing Co.

Mr. Hinton: The witness is instructed to supply Mr. Cavanagh with the chewing gum sales and the annual business of the Beech-Nut Packing Co. in dollars and cents, if she can ascertain the figures, to be produced at a later session.

Counsel for the parties had a conference about further figures to be supplied by plaintiff in effort to reach agreement.

X-Q. 28. Do I understand that this list "Total Number of Labels Before the Public," includes simply the

Beech-Nut labels with the red band, like the one shown on this chewing gum box?

A. Yes.

X-Q. 29. You have charge of the statistical records of the company, have you not?

A. Yes.

X-Q. 30. Do you keep records of the labeled goods like the Holly brand, a label I show you here, and the Erie brand like the label I also show you? Are the records kept separately?

A. Entirely separate.

X-Q. 31. What other brands do you keep records of? Have you a Mohawk brand?

A. Holly and Erie.

X-Q. 32. Are there any other brands that you have outside of Holly and Erie and Mohawk?

A. We have Holly and Erie. We do not have a Mohawk brand now. That is an old brand.

X-Q. 33. Those are the only other brands that you are using?

A. Yes.

X-Q. 34. Have you compiled any table showing the yearly sales of the Erie and Holly brands?

A. I have not.

X-Q. 35. Will you compile for me such a table?

A. I can if it is necessary.

X-Q. 36. I mean the yearly business in dollars and cents done in those two brands.

A. If it is necessary I can do it.

By Mr. Cavanagh: Counsel for the defendant offers in evidence three labels—the Erie brand which was fastened on one sheet and marked as single exhibit, Defendant's Cross-Exhibit No. 16, Plaintiff's Erie Brand Label. Likewise the Holly brand label was now offered in evidence and

marked Defendant's Cross-Exhibit No. 17, Plaintiff's Holly Brand Label.

Further examination of this witness is suspended pending reaching a conclusion as to the data to be furnished by the witness to defendant.

By Mr. Hinton: Witness will be produced again for examination by defendant in the event that it is necessary to have such an examination in connection with any further figures to be supplied the defendant by the witness.

Cross-examination closed.

Deposition closed.

CHRISTINA CARSWELL.

EARL A. NELLIS, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Earl A. Nellis. Your age is forty-three. You are manager of sales for the Beech-Nut Packing Co., plaintiff in this case; is that correct?

A. Yes.

Q. 2. How long have you been with the Beech-Nut Packing Co.?

A. Since 1906.

Q. 3. Has the Beech-Nut Packing Co. since that time extended its line to include new products?

A. Yes, a number of new products.

Q. 4. Have these new products been similar to or different to the products already produced?

A. In many instances quite different.

Q. 5. Will you give me an illustration?

A. Beech-Nut gum I think would be the most pronounced one.

Q. 6. Under what label have all these various goods been put out—I refer to first quality goods?

A. Beech-Nut in every instance.

Q. 7. Is that the regular Beech-Nut label such as appears on its chewing gum box?

A. Yes, the regular oval label.

Q. 8. Are you sufficiently familiar with the labels used by the Beech-Nut Packing Co., since your connection with the company, to identify without question every label which has been used by them if you were shown those labels?

A. Yes, since I have been with the company.

Q. 9. Have you examined the exhibit board marked "Beech-Nut Labels Displayed to the Public, 1891-1921" being Plaintiff's Exhibit No. 28? If so, will you state whether or not you recognize each and every one on that board?

A. I recognize them all since I have been connected with the company.

Q. 10. Are there any on the board that have been used since 1906 that you have any doubt about?

A. No.

Q. 11. With reference to the labels on the board indicated to have been used prior to 1906, did you ever see any of those labels and marks?

A. I have seen some of them on returned goods.

Q. 12. Which ones have you seen?

A. The one that would be called the "squat" jar and the label that went on top of the jar. I remember them all except the two on the extreme left—the lard and the one just above it.

Q. 13. Has each and every item which the Beech-Nut Packing Co. has manufactured been included in the regular sales or on the price lists of the Beech-Nut Packing Co.?

A. In practically every instance. Now and then experimental products would not be put on the price lists.

Q. 14. Did you ever carry your chocolate bars on your price lists?

A. No.

Q. 15. Did you ever carry your extract on your price lists?

A. No.

Q. 16. How about your canned tomatoes in big cans?

A. No. Sold on restricted territory.

Q. 17. Then it is not always true that the articles that you manufacture and pack are included in your price lists?

A. No, sir.

Q. 18. Since you have been with the Beech-Nut Packing Co., in what territory have the goods been sold?

A. Throughout the world. All over the United States—practically every country in the world.

Q. 19. How many salesmen have you now regularly employed?

A. I could not give you exact number, but I would say 225.

Q. 20. Have you sales offices outside of Canajoharie?

A. Yes, in a few places.

Q. 21. Have you a sales office in New York?

A. Yes.

Q. 22. Have you a sales office in Chicago, Ills.?

A. Yes.

Q. 23. In Boston?

A. Yes.

Q. 24. Other cities?

A. Some of the other cities.

Q. 25. How was Beech-Nut chewing gum received when it first came out?

A. Very favorably.

Q. 26. You know how many boxes of chewing gum were sold last year?

A. Better than ten million boxes in 1921 or as I like to put it better than a billion sticks.

Q. 27. Why do you refer to the individual sticks?

A. Each stick is a complete package. It has its wrapper and label. The label to my mind has a great deal of advertising value—you can see them on the streets almost anywhere you walk.

Q. 28. Can you state how many boxes of Beech-Nut chewing gum were sold since you came out with chewing gum?

A. It is better than fifty million boxes.

Q. 29. Can you identify what you mean by box?

A. It is the container holding twenty of the 5-stick packages.

Q. 30. Is it this box—Plaintiff's Exhibit No. 27?

A. Yes.

Q. 31. What does the retailer do with this box when he gets it?

A. It is displayed. The flap is gotten up for that purpose.

Q. 32. What was the going price for chewing gum at the time you came out with this product?

A. My memory is the price was 60 cents. We came out with 70 cent price. I remember when we came out with the 10 cent advance over the popular prices a number of our salesmen said it could not be done, that we would not make a success of it because of the higher prices.

Q. 33. What has been the situation on your chewing gum for the past few years—has there been a demand for it?

A. Yes. Time and time again we have instructed our salesmen to discontinue accepting or soliciting or-

ders for chewing gum. We confined ourselves to mail orders and the mail orders we prorated them as to production.

Q. 34. You have cited Beech-Nut gum as an example of your company making products quite different than food products. Can you give me another example?

A. Ginger ale is entirely foreign.

Q. 35. When did you come out with beverages?

A. 1919.

Q. 36. That was your first beverage?

A. Yes.

Q. 37. What happened in connection with the sale of Beech-Nut ginger ale?

A. It was very favorably received. We had to put on a night shift and then we could not keep up with the demand. I recall we had a remarkable demonstration in Boston, Cliquot's home town (Cliquot is made just outside the city, I believe). We sold forty cars.

Q. 38. Was that the first year?

A. That was the first year.

Q. 39. To what do you attribute the favorable reception of gum and beverages?

A. It is unquestionably the Beech-Nut name and the reputation the other products have established. Beech-Nut label does the trick with introductory orders.

Direct examination closed.

*Cross-Examination by Mr. Cavanagh.*

X-Q. 40. When was the last time you reduced the price on chewing gum?

A. The first of the year I believe it was.

X-Q. 41. 1922?

A. Yes.



X-Q. 42. You had cut the price of it in the market before last summer, had you not?

A. We had a reduction prior to that, but I cannot give you the date.

X-Q. 43. So although not being able to keep up with the demand for chewing gum and only taking mail orders and telling your salesmen not to solicit orders, you cut the price at different times?

A. The price was cut at the time we believed that our production was coming up to a point where we could take more business through the night shift, etc.

X-Q. 44. The question of what Wrigley or what the other concerns sell their goods for does not make any difference?

A. We try to make our own prices.

X-Q. 45. So you do not compete with the other chewing gum manufacturers?

A. We have to compete to a more or less extent but we have tried to sell Beech-Nut products on their own base.

X-Q. 46. I understand that you are the sales manager of the Beech-Nut Packing Co.?

A. Manager of sales, yes.

X-Q. 47. Without reference to any records but a general estimate, what does the business of the Beech-Nut Packing Co. amount to in the year?

A. I do not know if the management would care to have me give that information. It must come from some of the officials of the company.

X-Q. 48. You say you have about 225 salesmen?

A. Yes.

X-Q. 49. Do you know how many people are employed by the Beech-Nut Packing Co.?

A. No.

X-Q. 50. You were speaking of the various products

and brands of the Beech-Nut Packing Co. sold under your direction. I show you Defendant's Cross-Exhibit No. 16, Erie Brand Label and Defendant's Cross-Exhibit No. 17, Holly Brand Label. You sell those goods under those brands, do you not?

A. We have sold under both brands. We are not selling Holly we have discontinued that brand.

X-Q. 51. I think you mean Mohawk.

A. You are right, Mohawk.

X-Q. 52. Will you tell me just what these brands represent in the line of your goods, that is seconds?

A. The Erie brand represents a by-product as the result of manufacturing of the better grades. The Holly brand beef represents a second cut of beef; in other words, the Beech-Nut brand is held to be the very best of product.

X-Q. 53. These two brands which are sold by the Beech-Nut Packing Co. represent a cheaper grade of material or beef than Beech-Nut brand?

A. Yes.

X-Q. 54. You said Beech-Nut Packing Co. from time to time brought out different products under the Beech-Nut first grade or red band label. Those products brought out under that label are food products, are they not?

A. Yes and no. We are putting out some tooth paste now and that would not come under the head of food products.

X-Q. 55. When did you start to put out tooth paste; it must have been very, very recently, was it not?

A. Yes.

X-Q. 56. The labels on that board downstairs you referred to, those were all food products, are they not, so that the business of the Beech-Nut Packing Co. is really the packing and marketing of food products?

A. For the most part.

X-Q. 57. In your sales department you never sold any Beech-Nut cigarettes under the Beech-Nut label?

A. I could not say as to that.

X-Q. 58. You never heard of the Beech-Nut Packing Co. putting out Beech-Nut tobacco products?

A. I remember it was considered at one time. I could not say if it was Beech-Nut cigarettes or not.

X-Q. 59. You never gave your salesmen instructions to sell Beech-Nut tobacco products?

A. In general, no.

X-Q. 60. You have never known the Beech-Nut Packing Co. to put out on the market Beech-Nut tobacco?

A. Possibly there has been some put out in a very limited way. I am not sure about that one way or the other.

X-Q. 61. As far as the record in this case goes we have been only able to find, and I think it is admitted that a few orders, that one order of \$11.85 of cigarettes was sold and your department today is not making any attempt to sell Beech-Nut cigarettes under Beech-Nut label. Tobacco products are an entirely different kind of products from food products, are they not?

A. You cannot eat them.

X-Q. 62. You do not know of a man being in the food packing line and being in the tobacco line?

A. I do not know as to that. I never gave it a thought.

X-Q. 63. As a matter of fact you never really knew of anyone manufacturing food products and tobacco at the same time?

A. I do not recall any just now.

X-Q. 64. You cannot eat tobacco. You cannot smoke chewing gum either, can you?

A. I never heard of anyone smoking it.

X-Q. 65. You would not put a wad of gum in a pipe and smoke it, would you?

A. No.

X-Q. 66. These Holly and Erie brands are sold under your supervision?

A. Yes.

X-Q. 67. They are sold to the grocer just the same as the other Beech-Nut products are?

A. Yes.

X-Q. 68. They are sold in the open market?

A. Yes.

X-Q. 69. So if you wanted some Erie brand or the Holly brand you could probably buy it in the open market?

A. Yes.

X-Q. 70. Your gum and ginger ale have come under the Pure Food Act, do they not?

A. Under pure food regulation, yes.

X-Q. 71. You manufacture them in conformity with those regulations?

A. Yes.

*Redirect Examination by Mr. Hinton.*

R-D. Q. 72. Do you eat chewing gum?

A. I chew it.

R-D. Q. 73. Could it be said to be a food product?

A. No.

*Recross-Examination by Mr. Cavanagh.*

R-X Q. 74. Do you swallow the saliva with the sugar that is mixed with the gum?

A. When you chew it.

R-X Q. 75. Chewing gum is good for digestion?

A. That is the old theory. It is supposed to be in some instances.

R-X Q. 76. Some people consider it so?

A. Yes.

R-X Q. 77. Chewing gum is used by children and other people that you would not give tobacco to?

A. Yes.

R-X Q. 78. It is in the nature of a confection?

A. It comes under that head.

R-X Q. 79. You certainly would not take chewing tobacco for chewing gum?

A. If I wanted to chew one I would not take the other, no.

R-X Q. 80. You would not take a package of chewing gum for a package of tobacco?

A. No, but people might who used both. They might take one or the other.

R-X Q. 81. Do you mean to say that people in normal possession of their wits if they went into a store and asked for a package of chewing gum and the dealer handed them a package of cigarettes that they would take the cigarettes when they wanted chewing gum?

A. If that party were a user of both cigarettes and gum he might purchase the cigarettes if he could not get the gum. He might buy the cigarettes on the strength of the label.

R-X Q. 82. Suppose he went into a store and wanted a package of chewing gum, do you think that a normal man could be deceived into buying a package of cigarettes?

A. If he did not want anything but gum he would insist.

R-X Q. 83. Do you think he was normal if he took the cigarettes?

A. Yes.

R-X Q. 84. If you had a little girl eight years old and gave her a nickel to buy a package of gum. She

went into a store and asked for a package of gum and she came back with a package of cigarettes, would you not feel like taking hold of that man's hair for deceiving her?

A. I suppose so.

Recross-examination closed.

Deposition closed.

EARL A. NELLIS.

Stipulated by and between the parties through their respective counsel that Plaintiff's Exhibit No. 28, being the board marked "Beech-Nut Labels Displayed Before the Public, 1891-1921," and which is hereby offered in evidence, is displayed thereon the various labels used by the Imperial Packing Co. and the Beech-Nut Packing Co., its successors, arranged chronologically in accordance with the years in which the various products were put out as indicated by the sales records, orders for labels, memoranda and other official records of the company, subject to this exception, that the said board does not show certain other brands which have been put upon the market by the Beech-Nut Packing Co. or its predecessor, the Imperial Packing Co., such, for example, as Erie brand, exemplified by Defendant's Cross-Exhibit No. 16, and Holly brand as exemplified by Defendant's Cross-Exhibit No. 17, and Mohawk brand of which there is no label in evidence at this time. Subject to this exception the board may be received in evidence as containing a display of labels used by the Beech-Nut Packing Co., subject to correction of errors if any appear.

It is stipulated that Julia Hilke, if called, would testify as follows:

"I am of legal age and a resident of Canajoharie,

N. Y. In 1891 I worked for the Imperial Packing Co., the predecessor of the Beech-Nut Packing Co. I left the Imperial Packing Co. in 1891 when my nephew, John Hilke, was born (this being in 1891), in order to help take care of him as a baby. During the time I was working for the Imperial Packing Co. I took home with me a box which I now produce. This box has been in my possession ever since."

The box is now produced in evidence as Plaintiff's Exhibit No. 31.

It is stipulated that owing to shortness of time remaining for plaintiff to close its *prima facie* depositions, the plaintiff shall, notwithstanding the expiration of that time, have reasonable time in which to have original depositions properly gathered up, executed and filed in court.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT  
OF NEW JERSEY.

Beech-Nut Packing Company }  
vs. } Equity No. 3056.  
P. Lorillard Company.

*State of New York, County of Montgomery, ss:*

I, Fred M. Geortner, a Notary Public, in and for the County of Montgomery, State of New York, do hereby certify that the foregoing depositions of Mrs. Edith B. Kearns, John S. Ellithrop, Stanton Van Wie, Marshall Davis, Webster Davis, Colonel Davis, Christina Carswell, Earl A. Nellis were taken on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and by consent of counsel, before me, at Canajoharie, County of Montgomery and State of New York, beginning February 10, 1922, at 11 o'clock A. M. and ending February 11, 1922 at Noon; that each of the witnesses was by me duly sworn before testifying; that the testimonies of each witness was taken down in short hand under my supervision and reduced to typewriting under my supervision; that the foregoing pages contain a true and accurate transcript of the stenographic notes; that each deposition was read and signed by the witness except where the signatures of the witnesses are waived as appears on the deposition; that I am not connected by blood or marriage with either of the said parties, or interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at Canajoharie, County of Montgomery, State of New York, this 22nd day of February, 1922.

FRED M. GEORTNER,  
Notary Public.

[SEAL.]



IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT  
OF NEW JERSEY.

Beech-Nut Packing Company }  
                                  *vs.* } Equity No. 3056.  
P. Lorillard Company. }

**Stipulation.**

It is stipulated by and between the parties hereto, through their respective counsel, that the collection of papers which bear the signature of counsel for both parties hereto and which are marked respectively:

“Plaintiff’s Exhibit No. 12 A-12”

“Plaintiff’s Exhibit No. 12 A-13”

“Plaintiff’s Exhibit No. 12 A-14”

“Plaintiff’s Exhibit No. 12 A-15”

“Plaintiff’s Exhibit No. 12 A-16”

“Plaintiff’s Exhibit No. 12 A-17”

may be offered and received in evidence in this case and may be added to Plaintiff’s Exhibit No. 12 (A to A-11) already in evidence by stipulation in this case, so that Exhibit will now be Plaintiff’s Exhibit No. 12 (A to A-17) being a book containing forty-three sheets.

It is stipulated that these papers consist of the following subject-matter:

Plaintiff’s Exhibits Nos. 12 A-12 and 12 A-13 are original letters received by the Beech-Nut Packing Company in due course of business.

Plaintiff’s Exhibit No. 12 A-14 is an envelope with a photostatic copy of the check that came inclosed in it, received by the Beech-Nut Packing Company in due course of business through the mail, and it is stipulated that this is a correct photostatic copy of the check that came in this envelope, and that this envelope containing said check was delivered to and received by the Beech-Nut Packing Company in due course of business.

Plaintiff's Exhibit No. 12 A-15 is an original letter received by the Beech-Nut Packing Company in due course of business.

Plaintiff's Exhibit No. 12 A-16 and 12 A-17 are respectively, an original letter and an inclosure therein received by the Beech-Nut Packing Company in due course of business.

It is stipulated that each of the letters and documents of plaintiff's exhibits, No. 12 A-12, 12 A-13, 12 A-15, 12 A-16, and 12 A-17, was received in the ordinary and due course of business, is genuine and authentic, and was signed by the person whose name appears thereon, subject to the following:

Defendant is herewith supplied with photographic copies of each of the exhibits herein referred to for investigation thereof, and defendant reserves the right at any time before sixty days, in advance of the trial, to challenge the authenticity and genuineness of any of the foregoing exhibits, and plaintiff in that event agrees to produce where obtainable the persons who signed the same, and subject them to examination by defendant, if so requested to do, or to prove the signatures by other testimony, failing which to withdraw the exhibit.

Defendant reserves the right to object to the foregoing exhibits on the ground of materiality and relevance.

Plaintiff calls upon defendant to admit the authenticity and genuineness of each of the foregoing exhibits, under the provisions of Equity Rule 58.

OFFIELD, POOLE, HINTON & SCOTT,  
By SEBASTIAN HINTON,  
*Attorneys for Plaintiff.*  
RICHARD B. CAVANAGH,  
*Attorney for Defendant.*

April 5, 1922.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT  
OF NEW JERSEY.

Beech-Nut Packing Company }  
                                  *vs.* } Equity No. 3056.  
P. Lorillard Company. }

**Stipulation.**

It is stipulated by and between the parties hereto, through their respective counsel, that the collection of posters and signs marked "Plaintiff's Exhibit No. 32," consists of posters and signs made by or for the defendant and generally distributed by defendant and its agents throughout all or a large part of the United States for advertising purposes, and placed by defendant and its agents, or distributed to be placed on display before the public in stores selling tobacco, on buildings, fences, billboards and other places where such signs are customarily displayed.

For purpose of identification, these posters and signs have each affixed thereto a label containing the title of the case and the inscription, "Stipulated Lorillard Sign," signed by counsel for the parties; and said identification is sufficient to identify each of said posters and signs as one made by or for defendant and distributed by defendant according to this stipulation.

OFFIELD, POOLE, HINTON & SCOTT,  
By SEBASTIAN HINTON,  
Attorneys for Plaintiff.  
RICHARD B. CAVANAGH,  
Attorney for Defendant.

April 5, 1922.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW  
JERSEY.

Beech-Nut Packing Company }  
vs. } In Equity No. 3056.  
P. Lorillard Company.

**Stipulation.**

It is stipulated by and between the parties hereto, through their respective counsel, that the scrap book marked "Plaintiff's Exhibit No. 33" in this case, signed by both counsel, contains a collection of the labels used on brands of tobacco heretofore and now sold by defendant.

The aforesaid labels have each been marked with a stamp as follows:

"Beech-Nut v. Lorillard, Pl. Ex. 33."  
and the aforesaid stamp, together with the signature of counsel to the scrap book, is a sufficient identification of the labels, subject to correction if error appears.

Each of the aforesaid labels may be offered in evidence by plaintiff without further testimony covering the same.

OFFIELD, POOLE, HINTON & SCOTT,  
By SEBASTIAN HINTON,  
Attorneys for Beech-Nut Packing Company.  
RICHARD B. CAVANAGH,  
Attorney for P. Lorillard Co.

April 10, 1922.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,		
<i>Defendant.</i>		

It is stipulated by and between the parties hereto, through their respective counsel, that the attached copy of the testimony of George B. Roach and Bryan O. Foster for plaintiff and the Examiner's certificates thereto, taken at Pembroke, Kentucky, January 16 and 17, 1922, before S. F. Davis, a notary public and court reporter, acting as Special Examiner by consent of counsel, being a carbon copy of the original containing corrections agreed to by counsel for the parties, may be received and filed in this case with full force and effect of the original transcript duly filed by the Examiner, before whom the evidence was taken.

The reason for the substitution of the attached carbon copy of the original is as follows:

When the testimony was taken and transcribed, copies thereof were sent to both counsel by the Examiner, the original being retained in the possession of the Examiner. Counsel for the parties thereafter agreed to corrections in the transcript, as embodied in the attached carbon, and the Examiner was instructed to make said corrections and file the original testimony.

After making the corrections, but prior to filing the original transcript, S. F. Davis, the Examiner, died, and diligent search of his office and belongings has failed to disclose said original transcript.

OFFIELD, POOLE, HINTON & SCOTT,  
*Attorneys for Plaintiff.*

RICHARD B. CAVANAGH,  
*Attorney and Counsel for Defendant.*

June 8, 1922.

## UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,		
<i>Defendant.</i>		

**Stipulation As To Record of Sales of Plaintiff, Beech-Nut Packing Company, for the Years 1903-1921, Inclusive.**

It is hereby stipulated by and between the parties hereto, through their respective counsel, that the "Table of Sales Statistics" of the Beech-Nut Packing Company, the plaintiff herein, for the years 1903 to 1921 (inclusive), and hereinbelow set forth, was furnished to the defendant by the plaintiff on April 10, 1922. Plaintiff further stipulates that this table was prepared or transcribed by plaintiff from its regular books or records, and that the amounts or figures given in dollars and cents for each year are true and accurate.

TABLE OF SALES STATISTICS, BEECH-NUT PACKING COMPANY,  
1903-1921.

Furnished R. B. Cavanagh, Counsel for P. Lorillard Co.,  
by Sebastian Hinton, Counsel, Beech-Nut Packing Co.,  
April 10th, 1922.

	<i>Total Sales.</i>	<i>Reg. Line.</i>	<i>Gum.</i>	<i>Comp. Tab. Misc. Conf. Bev.</i>
1903	\$ 563,764.37	\$ 563,764.37	\$	\$
1904	832,906.10	832,906.10		
1905	1,000,986.83	1,000,986.83		
1906	1,267,877.81	1,267,877.81		
1907	1,293,059.92	1,293,059.92		
1908	1,408,481.33	1,408,481.33		
1909	1,950,534.60	1,950,534.60		
1910	2,555,315.85	2,555,315.85		
1911	2,838,384.99	2,819,441.56	18,943.43	
1912	3,179,337.79	2,778,822.00	400,515.79	
1913	4,112,592.99	2,681,110.07	1,431,482.92	
1914	4,966,337.76	2,484,854.93	2,480,023.48	1,459.35
1915	5,703,945.39	2,258,356.76	3,288,521.35	157,067.28
1916	6,598,385.15	2,681,685.97	3,632,127.15	284,572.03
1917	7,363,678.56	3,407,467.30	3,594,864.53	361,346.73
1918	6,754,967.21	4,502,462.68	1,853,038.28	399,466.25
1919	8,979,586.35	5,378,607.40	2,233,860.24	1,367,118.71
1920	11,138,226.51	5,435,324.37	3,955,902.00	1,747,000.14
1921	12,109,573.68	4,618,207.28	6,281,945.41	1,209,420.99

Plaintiff further stipulates that in said "Table of Sales Statistics" in the column bearing the caption, "Total Sales," appear true and accurate figures in dollars and cents of the total sales of all goods sold and delivered by the Beech-Nut Packing Company, yearly, from 1903 to 1921 (inclusive). The remaining three columns of the chart, bearing the captions, "Reg. Line," "Gum" and "Comp. Tab. Misc. Conf. Bev.," indicate how the total figures or amounts shown in the "Total Sales" column are divided amongst various items of plaintiff's sales business. For example, in the year of 1921 the total sales were \$12,109,573.68, this sum or amount being made up or composed of \$4,618,207.28, sales in Regular Line; \$6,281,945.41, sales in Gum; and \$1,209,420.99, sales in Compound Tablets, Miscellaneous Confectionery and Beverages, etc. It is further stipulated that the figures or sums herein given also include goods which have been returned by dealers in course of business. This item (returned goods) amounted to .0043 of the total in the year 1920, and was the highest it has ever been in that year.

Plaintiff, upon request of defendant, explains the falling off in total business in 1918, and of the gum business 1918-1919, as follows:

The reasons for the falling off in sales of gum 1918-1919 (which caused the falling off in the total sales in 1918, shown by the figures) were as follows:

1. Plaintiff was unable to secure prime chicle in these years in sufficient quantities to meet the demand for its gum.

2. Plaintiff was restricted by the Government in the quantity of sugar it could obtain.

During the greater portion of 1918-1919, plaintiff was allotting gum shipments on the basis of one-half to one-



third of the amount ordered and turning away a large amount of business in gum, etc. Gum production did not meet the demand until well along in 1921.

It is further stipulated by the parties that the furnishing of this "Table of Sales Statistics" by the plaintiff to the defendant may be considered as a compliance with the requests of defendant's counsel for data along this line made during the examination of Christina Carswell, statistical manager of plaintiff, and the production of said Christina Carswell and the witness Francis E. Barbour for further examination as to statistics of the business of the plaintiff is waived.

OFFIELD, POOLE, HINTON & SCOTT,  
*Counsel for Plaintiff.*

MEYERS, CAVANAGH & WHITEHEAD,  
RICHARD B. CAVANAGH,  
*Counsel for Defendant.*

Dated May 27, 1922.

## UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,		
<i>Defendant.</i>		

**Stipulation Re Record.**

It is hereby stipulated, by and between the parties hereto, that the record in the United States Patent Office opposition proceeding, entitled P. Lorillard Company *vs.* Beech-Nut Packing Company—Trade-Mark Opposition No. 2805—comprising the testimony, stipulations and exhibits of the parties, may be, and the same is hereby incorporated in the present suit, as a part of the record hereof, and shall have the same force and effect as if originally contained herein.

It is further stipulated that either party may use in this case uncertified copies of any and all official decisions rendered in said opposition proceeding, with the same force and effect as if duly certified.

It is further stipulated that copies of the records of the parties in said opposition proceeding, as printed for the Patent Office, may be used herein, without reprinting.

OFFIELD, POOLE, HINTON &amp; SCOTT,

By SEBASTIAN HINTON,

*Counsel for Beech-Nut Packing Co.*

RICHARD B. CAVANAGH,

*Counsel for P. Lorillard Company.*

Dated:

Canajoharie, N. Y.,

February 11, 1922.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,		
<i>Defendant.</i>		

### Stipulation.

It is hereby stipulated by and between the parties, through counsel, that the following is a list of defendant's exhibits and cross-exhibits either introduced, or marked for identification, or referred to, during the taking of both plaintiff's and defendant's depositions herein, and that each and every of said exhibits may be and is hereby formally offered in evidence and marked as indicated in the following list, if such exhibits have not already been formally offered in evidence during the taking of the depositions.

Defendant's Cross-Exhibit No. 1—Beech-Nut Scrap Tobacco—Plaintiff's Rec., p. 35.

Defendant's Cross-Exhibit No. 2—Beech-Nut Chewing Gum—Plaintiff's Rec., p. 37.

Defendant's Cross-Exhibit No. 3—Sheet bearing Beech-Nut Packing Company's label (chewing gum flap) Plaintiff's Rec., p. 47.

Defendant's Cross-Exhibit No. 4—Carton Beech-Nut cigarettes—Plaintiff's Rec., p. 86.

Defendant's Cross-Exhibit No. 5 — Advertisement Beech-Nut Cigarette, Boston Herald of August 18, 1921 —Plaintiff's Rec., p. 138.

Defendant's Cross-Exhibit No. 6—Beech-Nut Mints—Plaintiff's Rec., p. 145.

Defendant's Cross-Exhibit No. 7—Beech-Nut peanut butter—Plaintiff's Rec., p. 301.

Defendant's Cross-Exhibit No. 8—Beech-Nut bacon label—Plaintiff's Rec., p. 430.

Defendant's Cross-Exhibit No. 9—Open carton Beech-Nut cigarettes—Plaintiff's Rec., p. 518.

Defendant's Exhibit No. 10 (A, B and C) Lorillard order blanks—Defendant's Rec., Vol. I, p. 479.

Defendant's Exhibit No. 11—West Haven Drug Store Display—Defendant's Rec., Vol. II, p. 1213.

(No Defendant's Exhibits Nos. 12, 13 or 14.)

Defendant's Cross-Exhibit No. 15—Four advertisements of Beech-Nut Food Products from Ladies' Home Journal—Plaintiff's Rec., p. 811.

Defendant's Cross-Exhibit No. 16—Beech-Nut Packing Co.'s Erie Brand label—Plaintiff's Rec., p. 846.

Defendant's Cross-Exhibit No. 17—Beech-Nut Packing Co.'s Holly Brand label—Plaintiff's Rec., p. 847.

OFFIELD, BULKLEY, POOLE & SCOTT,  
*Counsel for Beech-Nut Packing Co.*

RICHARD B. CAVANAGH,  
*Counsel for P. Lorillard Company.*

Dated:

NEW YORK CITY,  
October 25th, 1923.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT  
OF NEW JERSEY.

Beech-Nut Packing Company,	} In Equity No. 3056.
<i>Plaintiff,</i>	
<i>vs.</i>	
P. Lorillard Company,	
<i>Defendant.</i>	

**Amendment to Bill of Complaint.**

Now comes Beech-Nut Packing Company, the plaintiff in the above-entitled cause and amends its bill of complaint as follows:

In paragraph 6, strike out the last word "with" of the eighth line and the first two words, "out exception," of the ninth line and the fifth, sixth and seventh words, "all of the," of the ninth line; and insert the word "which" after the third word, "goods," of the tenth line.

BEECH-NUT PACKING COMPANY,  
By OFFIELD, BULKLEY, POOLE & SCOTT,  
H. McCLURE JOHNSON,  
*Its Solicitors.*

It is hereby agreed that the foregoing amendment to the bill of complaint may be filed in this suit and defendant hereby waives further answer.

OFFIELD, BULKLEY, POOLE & SCOTT,  
*Counsel for Plaintiff.*  
R. B. CAVANAGH,  
*Counsel for Defendant.*

Oct. 29, 1923.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,	}	In Equity No. 3056.
<i>Plaintiff,</i>		
<i>vs.</i>		
P. Lorillard Company,		
<i>Defendant.</i>		

**Stipulation.**

It is stipulated by and between the parties hereto, through their respective counsel, that the collection of papers, which bear the signature of counsel for both parties hereto and which are marked respectively:

Plaintiff's Exhibit No. 12 A-18;

“ “ “ 12 A-19;

“ “ “ 12 A-20;

“ “ “ 12 A-21;

“ “ “ 12 A-22;

“ “ “ 12 A-23;

“ “ “ 12 A-24;

May be offered and received in evidence in this case and may be added to Plaintiff's Exhibit No. 12 (A to A-17), already in evidence by stipulation in this case, so that said exhibit will now be Plaintiff's Exhibit No. 12 (A to A-24) being a book containing fifty sheets.

It is stipulated that these papers consist of the following subject-matter:

Plaintiff's Exhibits Nos. 12 A-18, 12 A-20 and 12 A-22 are original letters received by the Beech-Nut Packing Company in due course of business.

Plaintiff's Exhibits Nos. 12 A-19 and 12 A-21 are original post-cards received by the Beech-Nut Packing Company in due course of business.

Plaintiff's Exhibit No. 12 A-23 is a photostatic copy of letter and envelope received by the Beech-Nut Pack-

ing Company in due course of business, of which the originals were returned to the writer thereof; and it is stipulated that this is a correct photostatic copy of same.

Plaintiff's Exhibit No. 12 A-24 is an original letter with its envelope received by the Beech-Nut Packing Company in due course of business.

It is stipulated that each of the letters and post-cards of Plaintiff's Exhibits Nos. 12 A-18, 12 A-19, 12 A-20, 12 A-21, 12 A-22 and 12 A-24, was received in the ordinary and due course of business, is genuine and authentic, and was signed by the person whose name appears thereon, subject to the following:

Defendant reserves the right to object to the foregoing exhibits on the ground of materiality and relevancy.

OFFIELD, BULKLEY, POOLE & SCOTT,  
*Attorneys for Plaintiff.*

RICHARD B. CAVANAGH,  
*Attorney for Defendant.*

Dated:

NEW YORK CITY,

October 29th, 1923.